(8)

No. 00-346-CFX Title: Norfolk Shipbuilding & Drydock Corporation, Petitioner
v.
Celestine Garris, Administratrix of the Estate of Christopher Garris, Deceased

Docketed: September 1, 2000

Court: United States Court of Appeals for the Fourth Circuit

Entry	Date	Proceedings and Orders
	Aug 30 2000	Petition for writ of certiorari filed. (Response due October 1, 2000)
	Sep 14 2000	Waiver of right of respondent Celestine Garris, etc. to respond filed.
	Sep 20 2000	DISTRIBUTED for Conference of October 6, 2000
	Sep 27 2000	Response requested.
	Oct 27 2000	Brief of respondent Celestine Garris, etc. in opposition filed.
	Nov 8 2000	REDISTRIBUTED for Conference of November 22, 2000
	Nov 9 2000	Reply brief of petitioner Norfolk Shipbuilding & Drydock Corporation filed.
	Nov 27 2000	REDISTRIBUTED for Conference of December 1, 2000
	Dec 4 2000	REDISTRIBUTED for Conference of December 8, 2000
	Dec 11 2000	Petition GRANTED. SET FOR ARGUMENT April 18, 2001. **********
	Jan 25 2001	Joint appendix filed.
	Jan 25 2001	Brief of petitioner Norfolk Shipbuilding & Drydock Corporation filed.
	Feb 22 2001	CIRCULATED.
	Feb 23 2001	Brief of respondent Celestine Garris, Administratrix in opposition filed.
	Feb 23 2001	Record filed.
	Mar 2 2001	Record filed.
	Mar 29 2001	Reply brief of petitioner Norfolk Shipbuilding & Drydock Corporation filed.
	Mar 30 2001	LODGING consisting of twenty bound copies of related material submitted by counsel for the petitioner and distributed.
	Apr 18 2001	ARGUED.

Supreme Court, U.S.
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No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

NORFOLK SHIPBUILDING
& DRYDOCK CORPORATION
Petitioner,

v.

CELESTINE GARRIS, ADMINISTRATRIX OF THE ESTATE
OF CHRISTOPHER GARRIS, DECEASED
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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I. QUESTION PRESENTED

Whether Moragne v. States Marine Lines, 398 U.S. 375 (1970), a case which was superseded and reversed by Congress in 1972, created or now should be extended to create a new judge-made general maritime law wrongful death cause of action in negligence for the accidental death of a non-seaman in state territorial waters?

II. PARTIES

All parties to the proceeding below are identified in the caption of this case except E. T. Gresham, Inc. ("Gresham"). Gresham was originally named as a co-defendant in this action. It participated in the proceedings before the United States Court of Appeals for the Fourth Circuit. Upon motion of Celestine Garris, the Court of Appeals entered an order dismissing Gresham from this action, with prejudice, on May 1, 2000.

III. CORPORATE DISCLOSURE STATEMENT

The parent company of the petitioner, Norfolk Shipbuilding & Drydock Corporation ("NORSHIPCO"), is United States Marine Repair, Inc. No publicly held company owns 10 percent or more of NORSHIPCO's stock.

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1 Steven F. Friedell, Benedict on Admiralty § 105 n.19 (7th ed. 1999) 16, 17

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Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty § 6-32, at 368 (2d ed. 1975) 7

1 Martin J. Norris, The Law of Maritime Personal Injuries § 3:25, at 101 (4th ed. 1990) 18

United States Department of Labor, Bureau of Labor Statistics, Table A-10, Fatal Occupational Injuries by Industry, 1993-98 11

VI. LOWER COURT CASE CITATIONS

The opinion of the United States Court of Appeals for the Fourth Circuit appears at Appendix 1, and is reported at 210 F.3d 209 (4th Cir. 2000).

The opinion of The Honorable Cynthia Holcomb Hall, United States Circuit Court Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation and concurring in the judgment of the Fourth Circuit appears at Appendix 28, and is reported at 210 F.3d 209, 222 (4th Cir. 2000).

The opinion of The Honorable H. Emory Widener, Jr., dissenting to the Fourth Circuit's denial of NORSHIPCO's petition for rehearing en banc appears at Appendix 41.

The opinion of the United States District Court for the Eastern District of Virginia appears at Appendix 44, and is reported at 1999 A.M.C. 769 (E.D. Va. 1998)

VII. STATEMENT OF JURISDICTION

The petitioner, NORSHIPCO, seeks review of an opinion issued by the United States Court of Appeals for the Fourth Circuit on April 3, 2000. NORSHIPCO timely filed with the Court of Appeals a Petition for Rehearing En Banc, and the Court of Appeals issued an Order denying the Petition for Rehearing En Banc on June 1, 2000. This Court has jurisdiction to issue a writ of certiorari pursuant to 28 U.S.C.A. § 1254(1) (West 1993).

VIII. CONSTITUTIONAL AND STATUTORY PROVISIONS

A. The Death on the High Seas Act, 46 U.S.C.A. § 761 (West 1975).

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

B. The Longshore and Harbor Workers' Compensation Act, 33 U.S.C.A. §§ 903(a), 904, 905(a)-(b), 909 (West 1986), reprinted at App. 55.

C. The Virginia Wrongful Death Act, Va. Code Ann. § 8.01-50(A) (Michie 1992).

Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, or of any ship or vessel, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action, or to proceed in rem against such ship or vessel or in personam against the owners thereof or those having control of her, and to recover damages in respect thereof, then, and

in every such case, the person who, or corporation or ship or vessel which, would have been liable, if death had not ensued, shall be liable to an action for damages, or, if a ship or vessel, to a libel in rem, and her owners or those responsible for her acts or defaults or negligence to a libel in personam, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances, as amount in law to a felony.

D. The Virginia Workers' Compensation Act, Va. Code Ann. §§ 65.2-302, -307, -512, -515, -516 (Michie 1995 & Supp. 1999), reprinted at App. 59.

IX. STATEMENT OF THE CASE

The Incident. On April 8, 1997, Christopher Garris suffered fatal injuries while working onboard the *USNS Major Stephen W. Pless*. App. 3. At the time of the incident, the vessel was docked in navigable waters at NORSHIPCO. App. 2. Tidewater Temps, Inc. employed Christopher Garris to perform sand-blasting work for Mid-Atlantic Coatings, Inc. Id. Mid-Atlantic Coatings, Inc. served as a subcontractor of NORSHIPCO. App. 3

Plaintiff's State and Federal Remedies. Christopher Garris's mother, Celestine Garris ("Garris"), collected statutory death benefits under the Longshore and Harbor Workers' Compensation Act ("LHWCA"). App. 3. In addition to her LHWCA recovery, Garris filed a civil action against NORSHIPCO and Gresham in the United States District Court for the Eastern District of Virginia. Id. Garris asserted two claims: (1) a purported general maritime law wrongful death claim alleging negligence

and (2) a state law negligence claim under the Virginia Wrongful Death Act. App. 3, 53. Garris alleged in her complaint that the district court had jurisdiction pursuant to 28 U.S.C. § 1333. App. 52.

The District Court Dismissal. NORSHIPCO and Gresham moved to dismiss both claims. App. 44. The district court dismissed the federal maritime claim with prejudice, holding that Moragne v. States Marine Lines, 398 U.S. 375 (1970), did not create a cause of action for the death of a non-seaman in state territorial waters resulting from negligence and that no such cause of action existed under general maritime law. App. 44-50. The district court declined to exercise supplemental jurisdiction over Garris's state wrongful-death claim and dismissed that claim without prejudice. App. 50.

Conflicting Analysis On Appeal. Garris appealed to the United States Court of Appeals for the Fourth Circuit. A three-judge panel heard the appeal. In the panel decision, two judges "agree[d] with the district court and conclude[d] that Moragne did not recognize a general maritime law cause of action for wrongful death based upon negligence." App. 19. Moragne, the two-judge panel decision held, "was, both at its heart and in its facts, an unseaworthiness case." Id. The panel decision goes on, however, to create a new general maritime law negligence-based remedy for wrongful death. App. 19-27. In creating this new remedy, the panel decision relies expressly on the "principles of uniformity and consistency" found in Moragne. App. 20.

The third member of the panel wrote a concurring opinion agreeing with the judgment but arguing that "Moragne itself created a cause of action for negligence-based wrongful death." App. 28 (Hall, J., concurring). Thus, the concurring opinion argues that the Court of

Appeals did not need to create a new maritime law remedy because Moragne had already done so. Id.

NORSHIPCO timely filed a petition for rehearing en banc. App. 39. Although NORSHIPCO failed to obtain a majority vote in favor of rehearing, Judges Widener and Niemeyer did vote for rehearing. App. 40.

A Vociferous Dissent. Judge Widener wrote a dissenting opinion to the denial of rehearing. App. 41. In his opinion, Judge Widener argued that the panel's reliance upon Moragne is misplaced because the 1972 amendments to the LHWCA effectively "superseded and reversed" Moragne. App. 42. Judge Widener further argued that "the panel opinion creates a new cause of action which is exactly the opposite of that which Congress intended" when it passed the 1972 amendments to the LHWCA. App. 43.

X. ARGUMENT

A. The Court Must Resolve A Schizophrenic, Three-Way Split In The Federal Courts Of Appeal And State Supreme Courts Concerning Whether Moragne Recognizes Or Should Be Extended To Recognize A Judge-Made, Wrongful Death Cause Of Action In Negligence.

In Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199 (1996), the Court held that Moragne did not preempt "all previously available state remedies." 516 U.S. at 209. In other words, the Court addressed "what, if anything, [Moragne] removed from admiralty's stock." Id. at 210 n.7. The Court expressly reserved the question of "what Moragne added to the remedial arsenal in maritime cases . . . ." Id. This is the exact question presented here:

whether after Moragne — and after Congress's unambiguous rejection of Moragne in 1972 — the maritime remedial arsenal includes a judge-made, wrongful death cause of action in negligence predicated on the scuttled ruins of Moragne.

Thirty years have passed since the Court decided Moragne. During this time, the Federal Courts of Appeal and State Supreme Courts have struggled to distill its holding and remaining relevance. The courts addressing the scope of the cause of action created by Moragne are split three ways. This tripartite split results from (1) conflicting signals within Moragne about the scope of its holding;[1] (2) the impact of the 1972 amendments to the LHWCA overruling Moragne on its facts by prohibiting an unseaworthiness cause of action by longshoremen and harbor workers, see 33 U.S.C.A. § 905(b) (West 1986); and (3) conflicting policy considerations, including the historic admiralty policy favoring liberal remedies, the need for uniformity, federalism, and separation of powers.

1. Decisions Limiting Moragne To An Unseaworthiness Cause Of Action.

The Fifth and Eleventh Circuits, as well as the Supreme Court of Virginia, restrict Moragne to its holding

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[1] Under the facts of Moragne, the Court had only an unseaworthiness claim before it. 398 U.S. at 376. Nonetheless, the Court employed broader language in parts of its opinion. For instance, the Court granted certiorari in Moragne "to reconsider the important question of *remedies* under federal maritime law for tortious deaths on state territorial waters." Id. at 377 (emphasis added). Furthermore, the Court held: "We accordingly overrule The Harrisburg, and hold that an action does lie under general maritime law for death caused by violation of *maritime duties*." Id. at 409 (emphasis added). Of course, while unseaworthiness was a maturing maritime concept in 1970, there was and is nothing uniquely maritime about negligence.

and recognize that it created only an unseaworthiness cause of action. The en banc Fifth Circuit, in Ivy v. Security Barge Lines, Inc., 606 F.2d 524, 527 (5th Cir. 1979), cert. denied, 446 U.S. 956 (1980), considered whether a Jones Act seaman could supplement his Jones Act recovery by stating a "Moragne-engendered *negligence* action." 606 F.2d at 527 (emphasis in original). The court held that the seaman could not state the Moragne claim because "Moragne did not create or even discuss an action for negligence; it dealt only with death occasioned by unseaworthiness." Id.

The Eleventh Circuit followed Ivy in Ford v. Wooten, 681 F.2d 712 (11th Cir. 1982), cert. denied, 459 U.S. 1202 (1983). Ford addressed whether a nonseafarer's estate's wrongful death claim under general maritime law was "restricted to a claim of unseaworthiness [or] encompassed negligence as well." 681 F.2d at 714. Like the Fifth Circuit in Ivy, the Eleventh Circuit concluded that Moragne was an unseaworthiness — not a negligence — case. Id. at 716. It therefore considered "whether Moragne should be *extended* to permit recovery under general maritime law for wrongful death caused by negligence." Id. (emphasis added). The Eleventh Circuit declined to create the negligence-based remedy requested. Id.[2]

Likewise, the Virginia Supreme Court, in Brown v. Brown, 309 S.E.2d 586 (Va. 1983), cert. denied, 467 U.S.

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[2] The Eleventh Circuit in Ford recognized but declined to follow "Gilmore & Black's unsubstantiated assertion that negligence is actionable under Moragne." Ford, 681 F.2d at 716 n.4 (citing Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty § 6-32, at 368 (2d ed. 1975)).

1242 (1984), held that Moragne was limited to an unseaworthiness cause of action.

> We believe it is clear from the history of Moragne en route to the Supreme Court, and from the treatment it received on arrival there, that, as the Eleventh Circuit Court of Appeals stated in [Ford], "the Moragne remedy applies only to unseaworthiness." And, as the Fifth Circuit said in [Ivy], "Moragne did not create or even discuss an action for negligence; it dealt only with death occasioned by unseaworthiness."

309 S.E.2d at 590 (internal citations omitted).

2. Decisions Limiting Moragne To An Unseaworthiness Cause Of Action, Yet Creating A New Negligence Cause Of Action.

The Fourth and Ninth Circuits agree with Ivy, Ford, and Brown that Moragne created only an unseaworthiness remedy. See Garris v. Norfolk Shipbuilding & Drydock Corp., App. 1, 19 (4th Cir. 2000); Nelson v. United States, 639 F.2d 469, 473 (9th Cir. 1980).[3] These courts, nevertheless, apparently perceived a need for a Moragne-like negligence remedy and have both created for their circuits a general maritime law wrongful death cause of action in negligence based on the salvaged remnants of Moragne.

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[3] But see Garris, App. 34 (concurring opinion of Judge Hall of the Ninth Circuit disputing the Fourth Circuit's determination in Garris that Nelson held that Moragne created only an unseaworthiness cause of action).

In Nelson, the Ninth Circuit granted the wife of a seaman who died while working on a construction project a Moragne-like cause of action against the United States. 639 F.2d at 473. Without further analysis, the court held that "the need for uniformity in maritime wrongful death actions requires extension of Moragne to cover claims based on negligence, to the exclusion of state wrongful death statutes." Id.[4]

The Fourth Circuit in this case likewise concluded that "Moragne was a limited holding that came in response to a set of concerns that arose specifically in the context of unseaworthiness." App. 16. Thus, under Moragne Garris's harbor-worker-decedent had no general maritime law remedy against NORSHIPCO. The Fourth Circuit, nevertheless, concluded that the "principles of uniformity and consistency that formed the basis of Moragne" warranted the creation of a Moragne-like remedy sounding in negligence. App. 20.

3. Decisions Recognizing that Moragne Itself Created A Negligence-Based Cause of Action.

A third line of decisions — from the Second and Fifth[5] Circuits and the Supreme Court of Texas — conclude that Moragne created *both* an unseaworthiness and a negligence remedy. The Second Circuit, in

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[4] The Ninth Circuit's mistaken analysis was exposed in 1996 when Yamaha confirmed that state wrongful death remedies are *not* excluded by federal maritime law in state territorial waters. 516 U.S. at 214-15.

[5] As explained by Judge Hall in her concurring opinion in this case, the Fifth Circuit "appears to find itself on [two] sides of a circuit split." App. 35-36 n. 4.

Wahlstrom v. Kawasaki Heavy Industries, Ltd., 4 F.3d 1084 (2d Cir. 1993), cert. denied, 510 U.S. 1114 (1994), addressed whether the family of a pleasure-boater could bring a general maritime law cause of action against the manufacturer of the jet ski the decedent was operating at the time of his death. 4 F.3d at 1086. The Second Circuit recognized that on its facts Moragne was solely an unseaworthiness case. Id. at 1088. Nonetheless, the Second Circuit held that "the Supreme Court did not limit the new right of recovery to unseaworthiness claims, but instead established a general remedy for wrongful death under maritime law." Id. at 1088-89.

A panel of the Fifth Circuit, in Miles v. Melrose, 882 F.2d 976 (5th Cir. 1989), aff'd sub nom., Miles v. Apex Marine Corp., 498 U.S. 19 (1990), found that Moragne created both an unseaworthiness and a negligence remedy. While discussing the proper scope of damages available to a deceased seaman's mother — and without detailed analysis of the issue — the Fifth Circuit panel stated that "[i]n Moragne, the Supreme Court recognized a wrongful death action for negligence and unseaworthiness under the general maritime law." Miles, 882 F.2d at 985.

Also without detailed analysis, the Supreme Court of Texas, in General Chemical Corp. v. De La Lastra, 852 S.W.2d 916 (Tex.), cert. dismissed, 510 U.S. 985 (1993), held that Moragne created a negligence cause of action. 852 S.W.2d at 919. The Supreme Court of Texas permitted the personal representatives of two deceased shrimp boat workers to pursue a general maritime law

negligence claim against the manufacturer of a chemical allegedly causing the workers' deaths. Id. 917, 919.[6]

B. The Court Must Ultimately Harmonize The Important, But Conflicting, Policies That Militate For And Against Creation Of A New, Judge-Made Remedy In This Highly Legislated Area Of The Law.

1. Liberal Maritime Remedies.

As echoed in Moragne, "it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy . . . ." Moragne, 398 U.S. at 387 (citing The Sea Gull, 21 F. Cas. 909, 910 (C.C. Md. 1865)). The Fourth Circuit relied upon this historic policy statement in creating a new remedy for Garris to assert against NORSHIPCO. App. 20.

This Court's more recent maritime law decisions, however, recognize that the liberal policies echoed in Moragne are outdated. "We no longer live in an era when seamen and their loved ones must look primarily to the

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[6] Inevitably, the federal and state courts that have not considered the extent of Moragne will be faced with the issue sometime in the future. Between 1993 and 1998, 91 workers involved in marine cargo handling and 105 workers involved in ship and boat building and repairing sustained fatal occupational injuries. United States Department of Labor, Bureau of Labor Statistics, Table A-10, Fatal Occupational Injuries by Industry, 1993-98 (http://stats.bls.gov/special.requests/ocwc/oshwc/cfoi/cftb0121.txt). During this same time period, more than 4,500 recreational boaters were killed in state territorial waters. Boating Statistics 1998, United States Coast Guard, COMDTPUB P16754.12, pp. 9, 29. These numbers ensure that the ambiguities presented by Moragne will continue to vex the lower federal courts and state supreme courts for some time to come, absent a determination by this Court.

courts as a source of substantive legal protection from injury or death . . . ." Miles v. Apex Marine Corp., 498 U.S. 19, 27 (1990). "Congress and the States have legislated extensively in these areas." Id. "In this era," this Court has cautioned, "an admiralty court should look primarily to these legislative enactments for policy guidance." Id.; see Dooley v. Korean Air Lines Co., Ltd., 524 U.S. 116, 121-22 (1998) (looking to Congressional guidance provided in DOHSA).

2. Federalism.

The undermining of state legislative enactments by a judge-made cause of action implicates federalism concerns. Moragne itself recognized that "[i]n the United States, every State today has enacted a wrongful-death statute." 398 U.S. at 390. "[T]he primary basis of recovery under state wrongful-death statutes [is] negligence." Id. at 398. Moragne, it has been held, created only an unseaworthiness cause of action to supplement the negligence cause of action granted by the legislature of every state. See Garris, App. 19; Ford, 681 F.2d at 714; Nelson, 639 F.2d at 473; Ivy, 606 F.2d at 527; Brown, 309 S.E.2d at 590.

While each state grants a negligence-based wrongful death cause of action, each state also regulates when the cause of action may be brought. For example, the General Assembly of Virginia forbids wrongful death claims against a decedent's employer and, in appropriate cases, the employer's upstream contractors. Va. Code Ann. §§ 65.2-302, -307 (Michie 1995 & Supp. 1999), reprinted at App. 59-60. Here NORSHIPCO may have been able to successfully defend Garris's Virginia Wrongful Death Act claim if she had pursued it. App. 22-23. Similarly, legislation in other states limits wrongful death claims — in favor of workers' compensation remedies —

against an employee's employer and, in certain cases, appropriate upstream contractors providing the employment. See, e.g., 82 Am. Jur. 2d, *Workers' Compensation* § 71, at 78 (1992); Leone v. Columbia Sussex Corp., 610 N.Y.S.2d 586, 587 (N.Y. App. Div. 1994); Torch Operating Co. v. Bartell, 865 S.W.2d 552, 555 (Tex. Ct. App. 1993) (discussing Louisiana law); Walker v. United Steel Workers, Inc., 606 So. 2d 1243, 1244 (Fla. Dist. Ct. App. 1992); Matthews v. United States, 825 F.2d 35, 36-37 (4th Cir, 1987) (discussing Maryland law); Garvin v. Alumax of South Carolina, Inc., 787 F.2d 910, 912 (4th Cir.) (discussing South Carolina law), cert. denied, 479 U.S. 914 (1986); Capetola v. Barclay White Co., 139 F.2d 556, 559-60 (3rd Cir. 1943) (discussing Pennsylvania law), cert. denied, 321 U.S. 799 (1944). The judge-made remedy granted by the Fourth Circuit in this case trumps these state statutes by granting an additional remedy where state legislatures have concluded that one should not exist.

3. Uniformity.

The Fourth Circuit believed that admiralty's "principles of uniformity and consistency" permitted it to create a new remedy despite the Virginia rule limiting Garris's remedy. To the contrary, however, this Court and Congress have consistently recognized that admiralty's goal of uniformity is subservient to state policies in state territorial waters. In Miles, the Court opined that state statutes are "sufficient" to provide a negligence-based wrongful death remedy where they apply in state waters. 498 U.S. at 25. "Variations" in state wrongful-death law have "long been deemed compatible with federal maritime interests." Yamaha, 516 U.S. at 211. These variations operate at the local level and do not impact on maritime law's "proper harmony and uniformity in its international

and interstate relations." Just v. Chambers, 312 U.S. 383, 389 (1941). Accordingly, "[t]here is no merit to the contention that application of state law to determine rights arising from death in state territorial waters is destructive of the uniformity of federal maritime law." The Tungus, 358 U.S. 588, 594 (1959). This would appear particularly true when addressing remedies of non-seamen.

The Court recently reaffirmed this principle in Yamaha by holding that state wrongful death law, rather than a uniform federal rule, should apply to a jet-skiing accident in the territorial waters of Puerto Rico. 516 U.S. at 216. The Court

> concluded that extending state wrongful death statutes to fatal accidents in territorial waters [is] compatible with substantive maritime policies: "The subject is maritime and local in character and the specified modification of or supplement to the rule applied in admiralty courts . . . will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations."

Id. at 207 (quoting Western Fuel Co. v. Garcia, 257 U.S. 233, 242 (1921)). In short, therefore, uniformity concerns are not paramount when dealing with the application of simple state negligence remedies to maritime torts involving non-seafarers in state territorial waters.

4. Separation of Powers.

While state statutes implicate federalism concerns, Congressional enactments implicate separation of powers concerns. "Congress retains superior authority" in

determining maritime law remedies. Miles, 498 U.S. at 27. "[A]n admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation. These statutes both direct and delimit [admiralty court] action." Id.

Congress has taken the lead in prescribing remedies for longshoremen and harbor workers. It enacted the LHWCA which in its current version provides a comprehensive workers' compensation scheme for longshoremen and harbor workers. See 1A Richard Zaide, Benedict on Admiralty §§ 2-12 (7th ed. 1997) (discussing the LHWCA's development and scope of coverage). When in 1970 the Court created the Moragne unseaworthiness remedy for longshoremen and harbor workers, Congress promptly overruled Moragne by enacting 33 U.S.C. § 905(b) as part of the 1972 amendments to the LHWCA. This provision "specifically eliminates the right of longshoremen and harbor workers to recover against the vessel on the basis of unseaworthiness." App. 42 (Widener, J. dissenting from denial of rehearing en banc) (citing Scindia Steam Navigation Co., Ltd. v. De Los Santos, 451 U.S. 156, 165 (1981)).

In addition to legislatively overruling the remedy that Moragne granted, Congress expressed its intention in the legislative history of the 1972 amendments that admiralty remedies should not supplement the LHWCA or existing state law remedies. In passing § 905(b), Congress intended to

> place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any

> special maritime theory of liability or cause of action under whatever *judicial nomenclature* it may be called, such as "unseaworthiness," "non-delegable duty," or the like.

H.R. Rep. No. 92-1441 (1972), 1972 U.S.C.C.A.N. 4698, 4703. "Taken as a whole," therefore, "the manifest purpose of section 905(b) is to curtail rather than expand the availability of third party actions in admiralty." Parker v. South Louisiana Contractors, Inc., 537 F.2d 113, 117 (5th Cir. 1976), cert. denied, 430 U.S. 906 (1977).

Congress also prescribes general wrongful death remedies for deaths occurring outside state territorial waters. See 46 U.S.C.A. § 761 (West 1975). The Death on the High Seas Act ("DOHSA") provides a negligence-based wrongful-death cause of action for deaths "occurring on the high seas beyond a marine league from the shore of any State . . . ." Id. Why would Congress create a negligence-based wrongful death remedy applicable outside but not inside state territorial waters? "Congress was careful to make the Death on the High Seas Act applicable only outside state territorial waters so as not to intrude on state legislative competence." 1 Steven F. Friedell, Benedict on Admiralty § 105 n.19 (7th ed. 1999) (citing 59 Cong. Rec. 4482, 4886) (hereinafter "Friedell"); see The Tungus, 358 U.S. at 593 ("The legislative history of the Death on the High Seas Act discloses a clear congressional purpose to leave 'unimpaired the rights under State statutes as to deaths on waters within the territorial jurisdiction of the States.'"). In other words, "Congress did not extend DOHSA to territorial waters because it believed state statutes sufficient in those areas." Miles, 498 U.S. at 25.

Assuming as this Court did in Miles that DOHSA "both direct[s] and delimit[s]" the authority of the federal

courts to create new maritime law wrongful death remedies, 498 U.S. at 27, no new wrongful death remedy should be created for state territorial waters. When it enacted DOHSA (or even § 905(b) of the LHWCA) Congress certainly could have created the very negligence-based remedy the Fourth Circuit created for Garris in this case. Congress, however, chose not to do so. Congress's "considered judgment," Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978), was "not to intrude on state legislative competence" in state territorial waters, Friedell § 105 n.19, "because it believed state statutes sufficient in those areas." Miles, 498 U.S. at 25.

Much has changed since this Court decided Moragne. As Miles explained: "We sail in occupied waters. Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them." 498 U.S. at 36. The Court's recent decision in Dooley v. Korean Air Lines Co., Ltd., 524 U.S. 116 (1998), epitomizes this change. In Dooley, the Court cautioned against erecting new judge-made maritime remedies in close proximity to established statutory remedies. Because Congress did not create a survival action in DOHSA, the Court declined the invitation to create a general maritime law survival action in Dooley. 524 U.S. at 122-24. DOHSA, the Court held, "expresses Congress' considered judgment on the availability and contours of a survival action in cases of death on the high seas." Id. at 124 (internal quotation marks & citation omitted). "Because Congress has already decided these issues, it has precluded the judiciary from enlarging" the available remedies by creating a new cause of action. Id. at 123. The Court in Dooley concluded, "[e]ven in the exercise of our admiralty jurisdiction, we will not upset the balance struck by Congress by

authorizing a *cause of action* with which Congress was certainly familiar but nonetheless declined to adopt." Id. at 124 (emphasis added).

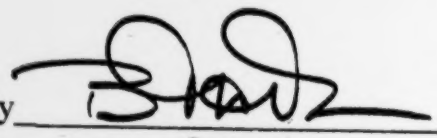
"Because Congress has already decided" not to legislate a negligence-based wrongful death remedy for harbor workers in state waters, a federal court should not create one on its own accord. Id. at 123-24. In DOHSA, Congress struck a balance between granting a uniform remedy for the high seas and withholding a remedy for state territorial waters. See Moragne, 398 U.S. at 397-98. Congress intentionally "fail[ed] to extend [DOHSA] to cover such deaths primarily" because state laws provided an adequate remedy in state waters and because Congress wanted to avoid any question of state law preemption. Id. at 397. By creating the new remedy here, the Fourth Circuit violated Dooley's clear instruction — "[e]ven in the exercise of . . . admiralty jurisdiction, [do] not upset the balance struck by Congress by authorizing a cause of action with which Congress was certainly familiar but nonetheless declined to adopt." Dooley, 524 U.S. at 124. Judge Widener's compelling dissent underscores this point: "In a case such as this in which Congress has made its intention explicit, I suggest it is beyond our warrant to substitute our notions of public policy for that of Congress." App. 43.

XI. CONCLUSION

For purposes of its decision in Yamaha, the Court assumed without deciding that a non-seafarer in territorial waters could bring a Moragne wrongful death action. See Yamaha, 516 U.S. at 210 n.7. Because non-seafarers are not owed a duty of seaworthiness, see 33 U.S.C.A. § 905(b) (West 1986); 1 Martin J. Norris, The Law of Maritime Personal Injuries § 3:25, at 101 (4th ed. 1990), the Court had to assume the existence of a negligence-

based wrongful death cause of action. The validity of this assumption has been debated in the federal courts of appeals and state supreme courts ever since the Court decided Moragne. As demonstrated by the tripartite split, these courts have reached no consensus on whether such a remedy exists. And given the conflicting — yet weighty — policy considerations underlying any decision to grant such a remedy, it is not likely that a consensus will ever be reached without this Court's intervention. Thirty years of ambiguity regarding this important issue is long enough. Accordingly, NORSHIPCO respectfully requests that this Court grant certiorari in this case to resolve the intractable split in authorities over the scope of Moragne and resolve the significant (and conflicting) policy considerations implicated when a federal court creates a new maritime law remedy governing negligent wrongful death in state territorial waters.

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION

By 
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August 30, 2000

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CELESTINE GARRIS, Administratrix of
the estate of Christopher Garris,
deceased,
Plaintiff-Appellant,

v. No.
98-2368

NORFOLK SHIPBUILDING & DRYDOCK
CORPORATION; E. T. GRESHAM,
INCORPORATED,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Virginia, at Norfolk.
Jerome B. Friedman, District Judge.
(CA-98-382-2)

Argued: December 2, 1999

Decided: April 3, 2000

Before MURNAGHAN and WILLIAMS, Circuit Judges, and Cynthia Holcomb HALL, Senior Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

Reversed and remanded by published opinion. Judge Williams wrote the opinion, in which Judge Murnaghan joined. Senior Judge Hall wrote an opinion concurring in the judgment.

COUNSEL

ARGUED: John R. Crumpler, Jr., KAUFMAN & CANOLES, P.C., Norfolk, Virginia, for Appellant. Robert Martin Tata, HUNTON & WILLIAMS, Norfolk, Virginia, for Appellees.
ON BRIEF: Patrick H. O'Donnell, KAUFMAN & CANOLES, P.C., Norfolk, Virginia, for Appellant. Carl D. Gray, HUNTON & WILLIAMS, Norfolk, Virginia, for Appellee Norfolk Shipbuilding; Glen A. Huff, M. Todd Gerber, HUFF, POOLE & MAHONEY, P.C., Virginia Beach, Virginia, for Appellee Gresham.

OPINION

WILLIAMS, Circuit Judge:

The sole issue on appeal is whether we should construe or extend the United States Supreme Court's decision in Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970), which recognized a general maritime law cause of action for wrongful death based upon unseaworthiness, to include a general maritime law cause of action for wrongful death based upon negligence. We agree with the district court that the Supreme Court did not create a general maritime law cause of action for wrongful death based upon negligence in Moragne. We find it appropriate, however, to apply the principles of Moragne and its progeny to recognize one. We, therefore, reverse the district court's dismissal of Celestine Garris's claim and remand for further proceedings.

I.

Christopher Garris (Garris's son) worked as a sandblaster aboard the USNS MAJ. STEPHEN W. PLESS, a ship berthed in the navigable waters of the United States. He was actually employed by Tidewater Temps but worked

on behalf of Mid-Atlantic Coatings (MidAtlantic), a subcontractor of Norfolk Shipbuilding & Drydock Corporation (Norfolk). E.T. Gresham, Inc. (Gresham), another subcontractor for Norfolk, had employees aboard the same ship. On April 8, 1997, a crane operator working for Gresham accidentally caused Garris's son to fall off a reserve hopper on the ship, which was used to load sand for sandblasting. Garris's son died as a result of the accident.

After receiving statutory death benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C.A. §§ 901-950 (West 1986 & Supp. 1999), Christopher Garris's mother, Celestine Garris (Garris), brought suit in the United States District Court for the Eastern District of Virginia against Norfolk and Gresham, seeking recovery for wrongful death based upon negligence under general maritime law and the Virginia wrongful-death statute. According to Garris, the crane operator's negligence and Norfolk's use of an inadequate communication signaling system were the reasons for her son's death. The district court dismissed her suit on the ground that general maritime law does not recognize a negligence based cause of action.[1]

Garris argues on appeal that the Supreme Court's holding in Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970), which recognized a general maritime law cause of action for wrongful death based upon unseaworthiness, also established a general maritime law cause of action for

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[1] The district court dismissed with prejudice Garris's general maritime law wrongful-death claim. The district court dismissed without prejudice her state law claim under the Virginia wrongful-death statute. Garris has not appealed the district court's dismissal of her state law claim and has since filed that claim in state court only against Gresham.

wrongful death based upon negligence. In the alternative, Garris asks us to extend the holding of Moragne to create a general maritime law cause of action for wrongful death based upon negligence. Reviewing this legal question de novo, see Meekins v. United Transp. Union, 946 F.2d 1054, 1057 (4th Cir. 1991) ("We review the district court's determinations of law de novo."), we conclude that the principles developed in Moragne and its progeny compel us to recognize a negligence-based action. We, therefore, reverse the district court's dismissal of this claim and remand for further proceedings.

II.

In order to determine whether the district court erred in dismissing Garris's suit, we must first consider whether the Supreme Court in Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970), intended to create a general maritime law cause of action for wrongful death based upon negligence. Accordingly, we must examine the language and context of Moragne, including the events and developments leading up to the Supreme Court's decision in that case.

A. Pre-Moragne

Our discussion begins with The Harrisburg, 119 U.S. 199 (1886), overruled by Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970), in which the Supreme Court held that general maritime law did not allow recovery for wrongful death. In The Harrisburg, the widow and child of the decedent, Rickards, sought to recover damages for Rickards's death "caused by the negligence of the steamer" that collided with Rickards's schooner. See id. at 199. The Court had to determine whether Rickards's survivors could recover for wrongful death absent a state statute or act of Congress affirmatively allowing such recovery. See id. at

204. The Court noted that at common law there was no civil action for an injury that resulted in death and that English maritime law also had no cause of action for wrongful death on the high seas. See id. The Court concluded that because

> it is now established that in the courts of the United States no action at law can be maintained for [wrongful death] in the absence of a statute giving the right, and it has not been shown that the maritime law, as accepted and received by maritime nations generally, has established a different rule for the government of the courts of admiralty from those which govern courts of law in matters of this kind, we are forced to the conclusion that no such action will lie in the courts of the United States under the general maritime law.

Id. at 213.

Despite the rule of The Harrisburg, which prohibited recovery for wrongful death under general maritime law, two significant developments in maritime law softened the harshness of The Harrisburg. First, in 1920, Congress enacted both the Death on the High Seas Act (DOHSA), 46 U.S.C.A. §§ 761 - 768 (West 1975 & Supp. 1999), and the Jones Act, 46 U.S.C.A. app. § 688 (West Supp. 1999), which afforded recovery for wrongful death in certain circumstances.[2] Second, federal courts began to recognize

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[2] DOHSA provides, in pertinent part, that "[w]henever the death of a person shall be caused by wrongful act . . . occurring on the high seas beyond a marine league from the shore of any State . . . the personal representative of the decedent may maintain a suit for damages in the district courts of the United States." 46 U.S.C.A. § 761 (West 1975). (continued)

the application of state wrongful-death statutes to fatal accidents that occurred in state territorial waters. See Yamaha Motor Corp. v. Calhoun , 516 U.S. 199, 206-08 (1996) (describing the response of "[f]ederal admiralty courts [in] temper[ing] the harshness of The Harrisburg's rule by allowing recovery under state wrongful-death statutes"); Western Fuel Co. v. Garcia, 257 U.S. 233, 242 (1921) (finding that California's wrongful-death statute applied to the death of a maritime worker in state territorial waters). Consequently, in the years that followed The Harrisburg, state wrongful-death statutes -- which often encompassed wrongful-death causes of action based upon negligence, but not unseaworthiness, see Moragne, 398 U.S. at 398-99 -- "proved an adequate supplement to federal maritime law[ ] until a series of this Court's decisions transformed the maritime doctrine of unseaworthiness into a strict liability rule."[3] Yamaha, 516 U.S. at 207-08. Because of this new development in maritime law, unseaworthiness, which originally was an obscure and rarely used cause of action for which many state wrongful-death statutes did not

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DOHSA, therefore, provides a federal claim for the wrongful death of any person that occurs more than a marine league, or three miles, from shore.

The Jones Act states that "[a]ny seaman who shall suffer personal injury in the course of his employment may . . . maintain an action for damages at law . . . and in case of death of such seaman as a result of any such personal injury the personal representative may maintain an action for damages at law . . . ." 46 U.S.C.A. app. § 688(a) (West Supp. 1999). Thus, the Jones Act permits recovery for the wrongful death of a seaman in all navigable waters.

[3] Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944), Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946), and Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960), all set forth and developed the rule that a shipowner's liability for unseaworthiness is absolute.

account, evolved into a cause of action that "soon eclipsed ordinary negligence as the primary basis of recovery when a seafarer was injured or killed." Id. at 208. The evolution of the unseaworthiness doctrine, however, also created gaps in the law whereby recovery for wrongful death based upon unseaworthiness could depend on mere happenstance. For example, if death occurred within state territorial waters, then recovery was unlikely because many state wrongful-death statutes did not include causes of action based upon unseaworthiness. See Moragne, 398 U.S. at 395. By contrast, if the death occurred more than three miles from shore, then recovery for wrongful death based upon unseaworthiness was possible under DOHSA. See id. The emergence of unseaworthiness as a viable and powerful tool for asserting claims against shipowners, and the discrepancies that necessarily followed, set the stage for Moragne, which gave the Supreme Court the opportunity to revisit the vitality and soundness of The Harrisburg in light of the changing maritime landscape.

B. Moragne v. States Marine Lines, Inc.

Moragne was a longshoreman who was killed aboard a ship in Florida's navigable waters. See Moragne v. States Marine Lines, Inc., 398 U.S. 375, 376 (1970). His widow sued in state court for wrongful death based upon unseaworthiness and negligence. See id. After removal to federal court, the district court dismissed her unseaworthiness claim, holding that general maritime law did not permit recovery for wrongful death based upon unseaworthiness in state territorial waters, and, unlike her negligence-based claim, Florida's wrongful-death statute did not encompass wrongful-death based upon unseaworthiness. See id. The only issue on appeal, therefore, was whether general maritime law recognized a cause of action for wrongful death based upon unseaworthiness. See id. at 377.

The Court's analysis began with The Harrisburg , which, as noted above, based its holding upon the premise that neither American nor English common law recognized civil actions for injuries that resulted in death. The Moragne Court, however, concluded that the Court's construction of the common law rule in The Harrisburg "was based upon a particular set of factors that had, when The Harrisburg was decided, long since been thrown into discard even in England, and that had never existed in this country at all." Id. at 381. Moreover, the Court noted that significant developments in American maritime law had further undercut The Harrisburg, including the emergence of state wrongful-death statutes and Congress's enactment of DOHSA and the Jones Act. See id. at 390. The Court stated that

> the work of the legislatures has made the allowance of recovery for wrongful death the general rule of American law, and its denial the exception. Where death is caused by the breach of a duty imposed by federal maritime law, Congress has established a policy favoring recovery in the absence of a legislative direction to except a particular class of cases.

Id. at 393. The Court, therefore, found it necessary to address "whether Congress has given such a direction[to deny recovery for wrongful death under general maritime law] in its legislation granting remedies for wrongful deaths in portions of the maritime domain." Id.

Examining the Jones Act and DOHSA to determine if they should be construed to preclude a general maritime cause of action for wrongful death within state territorial waters, the Moragne Court pointed to three anomalies that would be perpetuated if Congress had indeed intended the

Jones Act and DOHSA to preclude such recovery. First, identical conduct violating federal law in state territorial waters, such as the furnishing of an unseaworthy ship, would give rise to liability only if the victim were injured, but not killed. See id. at 395. Second, identical violations of the duty to furnish a seaworthy ship that resulted in death would give rise to liability for unseaworthiness under DOHSA more than three miles from shore but not within three miles of shore if the state's wrongful-death statute did not encompass unseaworthiness claims. See id. Third, a seaman, covered by the Jones Act, would have no cause of action for unseaworthiness while a longshoreman "to whom the duty of seaworthiness was extended only because he performs work traditionally done by seamen, [would have] such a remedy when allowed by a state statute." Id. at 395-96. Based upon these obvious anomalies, which arose from the emergence of unseaworthiness as a viable and prominent maritime cause of action, the Court concluded that Congress could not have intended to foreclose wrongful-death remedies in state territorial waters when it passed the Jones Act and DOHSA. The Court reasoned instead that "[t]he void that existed in maritime law up until 1920 [when Congress enacted DOHSA] was the absence of any remedy for wrongful death on the high seas. Congress, in acting to fill that void, legislated only to the three-mile limit because that was the extent of the problem." Id. at 398. Congress did not need to extend its reach into state territorial waters because "[t]he beneficiaries of persons meeting death on territorial waters did not suffer at that time from being excluded from the coverage of [DOHSA]," largely because "the primary basis for recovery under state wrongful death statutes was negligence" and unseaworthiness was a little used cause of action. Id. However,

> [s]ince that time the equation has changed drastically, through this Court's transformation of the shipowner's duty to provide a seaworthy ship into an absolute duty not satisfied by due diligence. The unseaworthiness doctrine has become the principal vehicle for recovery by seamen for injury or death, overshadowing the negligence action made available by the Jones Act; and it has achieved equal importance for longshoremen and other harbor workers to whom the duty of seaworthiness was extended because they perform work on the vessel traditionally done by seamen. The resulting discrepancy between the remedies for deaths covered by [DOHSA] and for deaths that happen to fall within a state wrongful-death statute not encompassing unseaworthiness could not have been foreseen by Congress.

Id. at 399 (internal citations omitted and emphasis added).

The Court concluded that the unforeseen development of unseaworthiness as a primary means of recovery under maritime law -- and not a congressional intent to foreclose recovery for wrongful death in state territorial waters -- was the primary reason for the anomalies that had emerged after The Harrisburg. See id. at 399-400. Noting that its recognition of unseaworthiness as a general maritime law wrongful-death cause of action furthered Congress's stated purpose of "uniformity in the exercise of admiralty jurisdiction" in enacting the Jones Act, id. at 401 (internal quotation marks omitted), the Court overruled The Harrisburg, and stated that "[w]e do not regard the rule of The Harrisburg as a closely arguable proposition -- it rested

on a most dubious foundation when announced [and] has become an increasingly unjustifiable anomaly as the law over the years has left it behind," id. at 404. Concluding that its decision "d[id] not require the fashioning of a whole new body of federal law, but merely remov[al of] a bar to access to the existing general maritime law," id. at 405-06, the Court held that "an action does lie under general maritime law for death caused by violation of maritime duties," id. at 409.[4]

Our examination of the language and context of Moragne reveals three crucial points that guide our analysis. First, the sole issue on appeal in Moragne was whether general maritime law recognized a wrongful-death cause of action based upon unseaworthiness; negligence was simply not an issue before the Court. See id. at 377. Second, the Court in Moragne referred repeatedly to unseaworthiness without expressly mentioning negligence. See Ford v. Wooten, 681 F.2d 712, 715 (11th Cir. 1982) (noting that Moragne mentioned unseaworthiness but never expressly discussed negligence); Ivy v. Security Barge Lines, Inc., 606 F.2d 524, 527 (5th Cir. 1979) (en banc) ("[Moragne] dealt only with an unseaworthiness claim asserted under general maritime law."). Third, the unforeseen evolution of the

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[4] Two years after the Court's decision in Moragne, Congress passed the 1972 amendments to the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C.A. §§ 901-950 (West 1986 & Supp. 1999), and specifically eliminated unseaworthiness as a cause of action for wrongful death as it related to longshoremen and harbor workers, such as Garris's son. See 33 U.S.C.A. § 905(b) (West 1986) ("The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness . . ."). The general maritime law cause of action for wrongful death based upon unseaworthiness still remains viable for true seamen. See Miles v. Apex Marine Corp., 498 U.S. 19, 30 (1990).

unseaworthiness doctrine as a powerful tool for recovery under maritime law was the stated predicate for the Court's analysis, and indeed, it played a large part in the Court's decision to overrule The Harrisburg. As the Court later recognized in Yamaha Motor Corp. v. Calhoun, 516 U.S. 199 (1996), "[t]he disparity between the unseaworthiness doctrine's strict-liability standard and negligence-based state wrongful-death statutes figured prominently in our landmark Moragne decision." Id. at 208.

The Moragne Court's clear focus on unseaworthiness, as opposed to maritime duties as a whole, is most evident in the Court's analysis of the three anomalies that arose after the emergence of unseaworthiness as a strict liability doctrine. Two of the three anomalies identified by the Court in Moragne were that: (1) identical violations of the duty of seaworthiness, each resulting in death, could give rise to liability more than three miles from shore but not within the territorial waters of a state that did not include unseaworthiness in its wrongful-death statute, and (2) a seaman, covered by the Jones Act, would have no cause of action for unseaworthiness while a longshoreman "to whom the duty of seaworthiness was extended only because he performs work traditionally done by seamen, [would have] such a remedy when allowed by a state statute." Id. at 395-96. The Court framed these two anomalies specifically in terms of unseaworthiness; these anomalies were cause for concern only within that context. The third anomaly, that identical violations of federal law, such as the furnishing of an unseaworthy vessel, would give rise to liability if the victim was injured but not killed if the state wrongful-death statute did not encompass unseaworthiness, see id. at 395, arguably might have applied to negligence-based actions, at least to the extent that state wrongful-death statutes did not include a cause of action for negligence-based wrongful death. As the Court noted in Miles v. Apex Marine Corp.,

498 U.S. 19 (1990), however, every state had a wrongful-death statute that did provide recovery for negligence-based actions even where the state did not provide similar recovery for unseaworthiness-based actions. See id. at 25. Consequently, none of these three anomalies, which played a prominent role in the Moragne Court's decision, applied equally between a general maritime law cause of action for wrongful death based upon unseaworthiness and a general maritime law cause of action for wrongful death based upon negligence. We have no difficulty concluding that Moragne recognized only a general maritime law cause of action for wrongful death based upon unseaworthiness.

C. Post-Moragne

Garris argues, nevertheless, that the Supreme Court's later decision in Yamaha Motor Corp. v. Calhoun, 516 U.S. 199 (1996), suggests that Moragne's holding was broader than a simple recognition of a general maritime law cause of action for wrongful death based upon unseaworthiness. In Yamaha, the Supreme Court addressed whether state remedies remain applicable in "maritime wrongful-death cases in which no federal statute specifies the appropriate relief and the decedent was not a seaman, longshore worker, or person otherwise engaged in a maritime trade." Id. at 202. The Court held that "state remedies remain applicable in such cases and have not been displaced by the federal maritime wrongful-death action recognized in [Moragne]." Id. Yamaha involved a jet ski accident that occurred in navigable waters. The parents of the decedent sued the jet ski manufacturer, which responded that state remedies were not applicable to accidents in navigable waters and that federal maritime law controlled to the exclusion of state law. The Court, therefore, had to address whether "the federal maritime claim for wrongful death recognized in Moragne

suppl[ies] the exclusive remedy in cases involving the deaths of nonseafarers in territorial waters." Id. at 205. In deciding that federal maritime claims for wrongful death did not displace state remedies, the Court briefly discussed Moragne and included two footnotes that, according to Garris, support her position. The first, footnote seven, states that

> [i]f Moragne's wrongful-death action did not extend to non-seafarers like [the decedent], one could hardly argue that Moragne displaced the state-law remedies the Calhouns seek. Lower courts have held that Moragne's wrongful-death action extends to nonseafarers. We assume, for purposes of this decision, the correctness of that position. Similarly, as in prior encounters, we assume without deciding that Moragne also provides a survival action. The question we confront is not what Moragne added to the remedial arsenal in maritime cases, but what, if anything, it removed from admiralty's stock.

Id. at 211 n.7 (internal citations omitted). The other, footnote eleven, states that "[w]hile unseaworthiness was the doctrine immediately at stake in Moragne, the right of action, as stated in the Court's opinion, is 'for death caused by violation of maritime duties.'" Id. at 214 n.11 (citing, inter alia, Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630 (1959) (stating that negligence is a violation of a maritime duty), and G.

Gilmore & C. Black, The Law of Admiralty 368 (2d ed. 1975)).[5]

Garris argues that these footnotes demonstrate that the Court interprets Moragne as recognizing a right of action "for death caused by violation of maritime duties," including negligence. Moragne, 398 U.S. at 409. We disagree. Although footnotes seven and eleven, read by themselves, arguably support Garris's position, particularly footnote eleven's reference to "the right of action" as being for the "violation of maritime duties," we note that the Court in footnote seven expressly refrained from addressing this question: "The question we confront is not what Moragne added to the remedial arsenal in maritime cases, but what, if anything, it removed from admiralty's stock." Yamaha, 516 U.S. at 210 n.7. Moreover, the Court in Yamaha recognized that Moragne relied in large part on unseaworthiness, stating explicitly that "[t]he disparity between the unseaworthiness doctrine's strict liability standard and negligence-based state wrongful-death statutes figured prominently in our landmark

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[5] G. Gilmore & C. Black, The Law of Admiralty 368 (2d ed. 1975) states that "[f]rom Justice Harlan's discussion of the 'anomalies' which the Moragne decision was designed to avoid several conclusions clearly follow . . . . The remedy provides recovery for deaths caused by negligence as well as for deaths caused by unseaworthiness. . . ." We note that this treatise offers no analysis to support its assertion that Moragne created a general maritime law cause of action for wrongful death based upon negligence. As discussed above, we construe the Moragne Court's analysis of the three anomalies differently than Gilmore & Black and conclude that the three anomalies applied only in the context of unseaworthiness. See supra part II.B. (discussing the three anomalies). At least one circuit has expressly rejected Gilmore & Black's reading of Moragne. See Ford v. Wooten, 681 F.2d 712, 717 n.4 (11th Cir. 1982) (referring to "Gilmore & Black's unsubstantiated assertion that negligence is actionable under Moragne").

Moragne decision," id. at 208, and that "[t]he uniformity concern that drove our decision in Moragne related . . . to the availability of unseaworthiness as a basis of liability," id. at 211. Yamaha's recognition of the historical and legal context of Moragne further supports our belief that Moragne was a limited holding that came in response to a set of concerns that arose specifically in the context of unseaworthiness.

Our conclusion is bolstered by those few circuits that have addressed this issue. In Ford v. Wooten, 681 F.2d 712 (11th Cir. 1982), for example, the Eleventh Circuit refused to construe Moragne as creating a general maritime law cause of action for wrongful death based upon negligence, stating that Moragne," which mentioned unseaworthiness but never expressly discussed negligence, pertained only to an unseaworthiness claim." Id. at 715. Likewise, in Ivy v. Security Barge Lines, Inc., 606 F.2d 524 (5th Cir. 1979) (en banc), the Fifth Circuit recognized that "Moragne did not create or even discuss an action for negligence; it dealt only with death occasioned by unseaworthiness." Id. at 527. Even the case upon which Garris relies, Nelson v. United States, 639 F.2d 469 (9th Cir. 1980), supports our conclusion that Moragne did not itself recognize a general maritime law cause of action for wrongful death based upon negligence. In Nelson, the Ninth Circuit addressed "whether or not the Government owes a duty of care to the employees of an independent contractor which has been engaged by the Government to perform hazardous maritime work." Id. at 470. In determining the "[t]he precise nature of plaintiff's cause of action," the court noted that prior to Moragne,

> there was no general maritime common law cause of action for wrongful death; state wrongful death acts were applied by federal courts sitting in admiralty. We have found

> no case deciding whether a Moragne suit may be based upon negligence as well as unseaworthiness. We hold that the need for uniformity in maritime wrongful death actions requires extension of Moragne to cover claims based on negligence, to the exclusion of state wrongful death statutes.

Id. at 473 (internal citation omitted and emphasis added). Thus, although the court found it appropriate to extend Moragne, it also recognized that Moragne did not itself create a general maritime law cause of action for wrongful death based upon negligence.[6] Finally, Garris correctly notes that the Moragne Court referred to maritime duties in

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[6] Indeed, Garris can point to only one federal court of appeals that has construed Moragne consistently with her position. In Wahlstrom v. Kawasaki Heavy Indus., 4 F.3d 1084 (2d Cir. 1993), the Second Circuit addressed whether "actions brought under the federal courts' admiralty jurisdiction are governed solely by federal maritime law." Id. at 1085. The court, after a brief discussion of Moragne, noted that

> [t]he Court was addressing the specific issue of what, if any remedy should be available for a wrongful death caused within state territorial waters by a vessel's unseaworthiness, a claim for which there was no right of recovery under applicable state law. In fashioning the remedy, however, the Supreme Court did not limit the new right of recovery to unseaworthiness claims, but instead established a general remedy for wrongful death under maritime law.

Id. at 1088-89 (internal citation omitted). Garris has not offered, nor have we found, another federal court of appeals decision that has adopted Wahlstrom's reading of Moragne. For the reasons stated above, we disagree with the Second Circuit's reading of Moragne.

its holding: "We accordingly overrule The Harrisburg, and hold that an action does lie under general maritime law for death caused by violation of maritime duties." Id. at 409. We do not believe, however, that this vague reference to "maritime duties," taken in the context of the entire decision and the events prompting that decision, is sufficient to counterbalance the Moragne Court's otherwise clear reliance on unseaworthiness as the basis for its decision. The context under which Moragne was decided speaks volumes; neither the events leading up to Moragne -- specifically, the emergence of unseaworthiness as a strict liability doctrine and its absence in many state wrongful-death statutes -- nor the Court's analysis of the three anomalies, framed in the specific context of unseaworthiness, apply equally to negligence-based actions.[7]

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[7] Garris argues that notwithstanding the limited issue before the Court in Moragne and its historical context, the Moragne Court must have intended to recognize a cause of action of wrongful death for all breaches of maritime duties because it explicitly overruled The Harrisburg, which held, in the context of a wrongful-death cause of action based upon negligence under general maritime law, that general maritime law did not afford recovery for wrongful death. Garris argues that "[i]f the Court meant to limit its holding to unseaworthiness, it would have merely distinguished The Harrisburg." (Appellant's Br. at 7.) The Court in The Harrisburg, however, relied explicitly upon Insurance Co. v. Brame, 95 U.S. 754 (1877), which held "that by the common law no civil action lies for an injury which results in death." Id. at 756. The Court in The Harrisburg found no reason to apply a different rule in admiralty than at common law, and, therefore, concluded that there could be no civil action for wrongful death in admiralty absent a relevant statute. See The Harrisburg, 119 U.S. at 213-14. Thus, although the issue before the Court in The Harrisburg had to do only with negligence-based wrongful-death actions, its rationale was applicable to all forms of wrongful death. The Moragne Court, therefore, had to overrule, rather than distinguish, The Harrisburg in order to create a general maritime law cause of action for wrongful death based upon (continued)

Our reading of Moragne, both from the Court's language and the context in which it was decided, as well as its subsequent interpretation, leads us to the inescapable conclusion that Moragne was, both at its heart and in its facts, an unseaworthiness case. We, therefore, agree with the district court and conclude that Moragne did not recognize a general maritime law cause of action for wrongful death based upon negligence.

III.

Having concluded that Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970), did not create a general maritime law cause of action for wrongful death based upon

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unseaworthiness. The Moragne Court's necessary step of overruling The Harrisburg does not suggest, as Garris argues, that it actually intended to recognize a general maritime law cause of action for wrongful death based upon negligence that was not before it on appeal.

We note that the Court in Miles v. Apex Marine Corp., 498 U.S. 19 (1990), read Moragne as recognizing a general maritime law cause of action for wrongful death based upon unseaworthiness for seamen, as opposed to only longshoremen, partially because" Moragne explicitly overruled The Harrisburg. The Harrisburg involved a true seaman." Id. at 30 (internal citation omitted). The other basis for the Miles Court's reading of Moragne, however, was that "all three of the 'anomalies' to which the Moragne cause of action was directed involved seamen. . . .It would be strange indeed were we to read Moragne as not addressing a problem that in large part motivated its result." Id. The Court in Miles, therefore, recognized a general maritime law cause of action for wrongful death based upon unseaworthiness for seamen partially because the reasoning applied equally between seamen and longshoremen. Here, however, unlike in Miles, the reasoning does not apply equally between unseaworthiness and negligence; the three "anomalies" in Moragne related specifically to a wrongful-death cause of action based upon unseaworthiness and had little relation to a wrongful-death cause of action based upon negligence.

negligence, we must now decide whether to extend Moragne to recognize such a cause of action. Because the creation of a negligence-based wrongful-death action is consistent with the principles of uniformity and consistency that formed the basis of Moragne, and because Congress has not affirmatively precluded a negligence-based wrongful-death claim, we find it appropriate to recognize a general maritime law cause of action for wrongful death based upon negligence.

In deciding to recognize a general maritime law cause of action for wrongful death based upon unseaworthiness, the Moragne Court concluded that

> the work of the legislatures has made the allowance of recovery for wrongful death the general rule of American law, and its denial the exception. Where death is caused by the breach of a duty imposed by federal maritime law, Congress has established a policy favoring recovery in the absence of a legislative direction to except a particular class of cases.

Id. at 393. Applying this principle, the Moragne Court examined the Jones Act and DOHSA to determine whether Congress had expressed an intent to preclude a general maritime law cause of action for wrongful death based upon unseaworthiness. The Moragne Court rejected the argument that DOHSA's failure to account for an unseaworthiness-based claim reflected a congressional intent to foreclose that cause of action. The Moragne Court, pointing to the three anomalies described above, noted that "[t]he resulting discrepancy between the remedies for deaths covered by [DOHSA] and for deaths that happen to fall within a state wrongful-death statute not encompassing unseaworthiness could not have been foreseen by

Congress." Id. at 399. The Moragne Court concluded that the absence of an unseaworthiness-based wrongful-death cause of action in DOHSA did not evidence a congressional intent to foreclose such a cause of action because "no intention appears that [DOHSA] have the effect of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law." Id. at 400. The Moragne Court reasoned, instead, that creation of a general maritime law cause of action for wrongful death based upon unseaworthiness was consistent with the purpose of the Jones Act, which

> was intended to achieve uniformity in the exercise of admiralty jurisdiction by giving seamen a federal right to recover from their employers for negligence regardless of the location of the injury or death. That strong concern for uniformity is scarcely consistent with a conclusion that Congress intended to require the present nonuniformity in the effectuation of the duty to provide a seaworthy ship.

Id. at 401 (internal quotation marks omitted). The Moragne Court concluded that "Congress has given no affirmative indication of an intent to preclude the judicial allowance of a remedy for wrongful death to persons in the situation of this petitioner." Id. at 393.

The Moragne Court's examination of the three anomalies, the Jones Act, and DOHSA is instructive. It demonstrates an analytical framework under which the Moragne Court created a general maritime law cause of action for wrongful death based upon unseaworthiness under circumstances where: (1) Congress had not affirmatively expressed an intention to bar such a cause of action; and (2) creation of that cause of action was

consistent with the policies of general maritime law articulated in the Jones Act -- uniformity in the exercise of admiralty jurisdiction.

This analytical framework likewise applies in the present case and counsels in favor of recognizing a Moragne action based upon negligence.[8] In the present case, Garris has no right of recovery under the existing statutory scheme. Garris cannot recover under DOHSA because her son died within state territorial waters. She cannot recover under the Jones Act because her son was a harbor worker, and not a seaman. And, she apparently cannot recover against Norfolk under the Virginia wrongful-death statute because the Virginia worker's compensation statute confers broader immunity than the LHWCA; unlike the LHWCA, which bars suit only against the immediate employer,[9] the Virginia statute bars state tort

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[8] A "Moragne action" or "Moragne cause of action" is simply another term for a general maritime law cause of action for wrongful death. See Miles v. Apex Marine Corp., 498 U.S. 19, 30 (1990) (referring to a "Moragne cause of action" in deciding whether to apply a general maritime law wrongful-death action to seamen); Miller v. American President Lines, Ltd., 989 F.2d 1450, 1457 (6th Cir. 1993) (referring to a "Moragne action").

[9] The LHWCA sets forth the exclusive remedies for a longshoreman or harbor worker's injury or death "occurring upon the navigable waters of the United States," including adjoining piers or dry docks, see 33 U.S.C.A. § 903(a) (West 1986), for injuries caused by a maritime employer, co-employee, or vessel. See 33 U.S.C.A. §§ 905, 933(i) (West 1986). The LHWCA requires the employer, inter alia, to compensate the injured longshoreman or harbor worker for certain disability costs, recovery costs, and to provide death benefits to certain beneficiaries. See 33 U.S.C.A. §§ 906-910, 914 (West 1986). It also permits the longshoreman or harbor worker to sue the employer if the employer fails to pay the prescribed benefits. See 33 U.S.C.A. § 905(a). (continued)

claims against contractors as well as immediate employers.[10] See Va. Code Ann. §§ 65.2-302, 307 (Michie Supp. 1999); Ward v. Norfolk Shipbuilding & Drydock Corp., 770 F. Supp. 1118, 1120 (E.D. Va. 1991) ("Under the Virginia Act, a contractor such as Norshipco is the 'statutory employer' of a subcontractor's or sub-subcontractor's employee, and therefore liable for compensation to such an employee. The exclusivity provision of the Virginia Act makes the contractor immune from suit for negligence, provided the subcontractors were performing the 'normal work' of the contractor. The LHWCA reaches the opposite result with respect to the liability of a contractor to a subcontractor's injured employee."); cf. Garvin v. Alumax of South Carolina, 787 F.2d 910, 918 (4th Cir. 1986) ("Congress has diligently attempted to preserve state law governance of state law third party claims by recipients of LHWCA compensation. Since there is no conflict between differing rules of immunity and application of South Carolina's rule [granting immunity to contractors] will not frustrate the effectiveness of any federal law . . . the contractor[ ] is immune from this state tort claim."). In other words, because Garris's son was a harbor worker who happened to be killed in Virginia's territorial waters, Garris cannot recover against Norfolk absent a federal maritime law cause of action for wrongful death based upon negligence.

We see no reason to deny Garris a basis of recovery simply because her son was a harbor worker who died in Virginia, as opposed to another state that permits recovery

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As part of this compensation scheme, the LHWCA confers immunity to an immediate employer from tort suits by injured employees. See id.

[10] That is presumably why Garris has sued only Gresham, and not Norfolk, in state court under the Virginia wrongful-death statute.

against contractors. First, Congress has not affirmatively expressed an intent to preclude a negligence-based wrongful-death cause of action against a third party. As the Court noted in Moragne, DOHSA does not preclude a "nonstatutory federal remed[y] that might be found appropriate to effectuate the policies of general maritime law." Moragne, 398 U.S. at 400. And, like DOHSA, the LHWCA does not evidence a congressional intent to preclude a general maritime law cause of action against third parties for wrongful death based upon negligence.[11]

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[11] The LHWCA generally does not address rights of recovery against third parties except in one instance: the LHWCA eliminated unseaworthiness as a cause of action against the vessel with respect to longshoremen and harbor workers and replaced that cause of action by permitting longshoremen and harbor workers to bring suit for negligence "against [the] vessel as a third party." See 33 U.S.C.A. § 905(b) (West 1986); Miles v. Apex Marine Corp., 498 U.S. 19, 28 (1990) ("If Moragne's widow brought her action today, it would be foreclosed by statute."); Garvin v. Alumax of South Carolina, 787 F.2d 910, 917 (4th Cir. 1986) ("Except with respect to claims against vessels addressed in 33 U.S.C.A. § 905(b), the LHWCA does not address the substantive rights of claimants against third parties.").

We recognize that Congress's removal of the unseaworthiness cause of action for longshoremen and harbor workers reduced their overall right of recovery. See Holland v. Sea-Land Serv., Inc., 655 F.2d 556, 558-59 (4th Cir. 1981) (stating that Congress "substantially limited the right of longshoremen to recover from third parties in tort actions" by eliminating unseaworthiness as a cause of action, but "preserve[d] his right under prior law to recover for third party negligence"). This restriction of rights, however, occurred within the limited context of unseaworthiness, and for a very specific reason: "'[t]he rationale which justifies holding the vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to longshoremen and other non-seamen working on board a vessel while it is in port.'" Harwood v. Partredereit AF 15.5.81, 944 F.2d 1187, 1198 (4th Cir. 1991) (Ervin, J., dissenting) (quoting H.R. Rep. No. 92-1441, 92nd Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & (continued)

Second, recognition of a general maritime law cause of action for wrongful death based upon negligence "effectuate[s] the policies of general maritime law" because it is consistent with the policy of achieving uniformity in admiralty law. Id. at 400. The location of a harbor worker's death -- a fact of true happenstance -- should not determine an injured party's ability to recover for wrongful death.[12]

Admin. News 4698, 4703). We do not believe that this limited curtailment of longshoremen and harbor workers' rights is inconsistent with our recognition of a general maritime law cause of action against third parties for wrongful death based upon negligence, nor does it express an affirmative congressional intent to preclude such a cause of action. Indeed, the LHWCA expressly leaves intact a longshoreman or harbor worker's rights against all other third parties except the employer and "persons in the same employ." See 33 U.S.C.A. § 933(i) (West 1986).

[12] Our recognition of a federal cause of action for wrongful death based upon negligence does not conflict with Garvin v. Alumax of South Carolina, 787 F.2d 910 (4th Cir. 1985), in which we held that South Carolina's worker's compensation statute conferred immunity to a contractor from an injured longshoreman's state tort action even though the injured longshoreman received benefits only under the LHWCA. See id. at 918. In Garvin, we noted that "[t]he federal immunity rule is to be applied when a third party claim is a federal claim; when the third party claim is a state law claim, the immunity rules of that state are to be applied." Id. at 917. Because Garvin dealt only with a state claim, and not a federal claim, Garvin is not inconsistent with our decision in the present case.

Nor does a negligence-based Moragne cause of action violate "important federalism principles" by impermissibly interfering with Virginia's grant of immunity to Norfolk under state law. (Appellee's Br. at 21.) First, the broader Virginia immunity rule would still apply to any state tort actions brought by Garris. To that extent, a Moragne cause of action does not interfere with state law at all. Second, although "[f]ederal maritime law has long accommodated the States' interest in regulating maritime affairs within their territorial waters . . . . Permissible state regulation . . . must be consistent with federal maritime

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Because such a cause of action is consistent with the framework set forth in Moragne, we hold that a general maritime law cause of action against third parties for wrongful death based upon negligence is available where a harbor worker, such as Garris's son, dies within state territorial waters.[13] For that reason, we reverse the district

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principles and policies." Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 215 n.13 (1996). Cf. Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409-10 (1953) ("While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretive decisions of this Court."). Accordingly, Norfolk's federalism argument does not deter us from recognizing a Moragne cause of action in this context.

[13] We recognize that the Supreme Court, in Dooley v. Korean Air Lines Co., 118 S. Ct. 1890 (1998), declined to extend general maritime law to permit recovery for pre-death pain and suffering under a general maritime law survival cause of action. See id. at 1895. In Dooley, the Court rejected the argument that DOHSA, which does not authorize recovery for pre-death pain and suffering, did not bar such damages under general maritime law because DOHSA is a wrongful-death statute rather than a survival statute. See id. The Court stated that

> DOHSA expresses Congress' judgment that there should be no such cause of action in cases of death on the high seas. By authorizing only certain surviving relatives to recover damages, and by limiting damages to the pecuniary losses sustained by those relatives, Congress provided the exclusive recovery for deaths that occur on the high seas.

Id. at 1894-95. The Court noted that "[b]ecause Congress has already decided these issues, it has precluded the judiciary from enlarging either the class of beneficiaries or the recoverable damages." Id. at 1895. Moreover, "it cannot be contended that DOHSA has no bearing on survival actions; rather, Congress has simply chosen to adopt a more limited survival provision." Id. The Court concluded that "[e]ven in the exercise of our admiralty jurisdiction, we will not upset the balance

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court's dismissal of Garris's general maritime law negligence-based claim and remand for further proceedings consistent with this opinion.

IV.

In conclusion, the language of Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970), combined with its historical and legal context and the absence of persuasive authority to the contrary, leads us to conclude that Moragne recognized only a general maritime law cause of action for wrongful death based upon unseaworthiness and not for wrongful death based upon negligence. However, because Congress has not affirmatively precluded a negligence-based cause of action, and because such a cause of action is consistent with the principle of uniformity expressed in Moragne and Miles v. Apex Marine Corp., 498 U.S. 19, 33 (1990) ("Today we restore a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law."), we find it appropriate to recognize a general maritime law cause of action for wrongful death based upon negligence. Accordingly, we reverse the district court's dismissal of

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struck by Congress by authorizing a cause of action with which Congress was certainly familiar but nonetheless declined to adopt." Id.

Unlike DOHSA, which addressed the remedy sought by the petitioners in Dooley, and, therefore, pervaded the field on that issue, the LHWCA does not address the third party cause of action that Garris seeks in the present case. In fact, as noted above, the LHWCA addresses third party rights only in the limited context of eliminating an unseaworthiness action against the vessel and replacing it with a negligence action against the vessel. Thus, unlike the Court in Dooley, we can find no congressional intent that precludes us from recognizing a Moragne cause of action against third parties other than vessels for wrongful death based upon negligence.

Garris's general maritime law negligence-based claim and remand for further proceedings.

REVERSED AND REMANDED

HALL, Senior Circuit Judge, concurring in the judgment:

Over the past three decades, Justice Harlan's opinion in Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970), has come to occupy an important place within the Supreme Court's canon. Generations of law students have studied Moragne for its scholarly discussion of legal process and the role of precedent. But before those students reach these abstract questions, their professors have no doubt tormented them by asking a seemingly simple question that defies a simple answer: What, precisely, is the holding of Moragne?

I.

The majority, which concludes in the first instance that Moragne's holding is limited to wrongful death unseaworthiness claims, gives what is in many ways a reasonable answer to that thorny question -- albeit one with which I cannot concur. And Part III of the majority opinion ultimately reaches the right result by finding a Moragne cause of action on the instant set of facts. The majority's explanation of why congressional silence and Appellant's lack of a state-law remedy warrant the creation of a federal admiralty remedy is particularly laudable. Because I would hold that Moragne already covers Appellant's claim, I find it unnecessary to reach Part III's analysis. But if I were inclined to interpret Moragne as narrowly as the majority does, I would certainly assent to Part III's sound discussion. Those words of explanation having been voiced, I shall explain why, in my view, Moragne itself created a cause of action for negligence-based wrongful death.

II.

In The Harrisburg, 119 U.S. 199 (1886), the Supreme Court held that general maritime law provided no cause of action for wrongful death. At the time, any successful wrongful death suit would have required the plaintiff to prove that the defendant acted negligently, and negligence was indeed the theory of liability pressed by The Harrisburg plaintiff and the only theory of negligence considered by the Supreme Court. See id. at 204.

Fifty-eight years later the Supreme Court recognized, for the first time, the doctrine of unseaworthiness. See Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944); see also Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 208 (1996) ("Prior to 1944, unseaworthiness was an obscure and relatively little used liability standard . . . .") (internal quotations marks omitted). In contrast to negligence, unseaworthiness is a strict liability theory flowing from the ship's owner to its crew, longshoreman, or harbor workers aboard the ship. See Ballwanz v. Isthmian Lines, 319 F.2d 457, 461 (4th Cir. 1963).

Twenty-six years after Mahnich, the Supreme Court decided Moragne, 398 U.S. at 375. In Moragne the plaintiff was a longshoreman's widow who brought an unseaworthiness suit against the owner of a ship on which her husband had perished. Like Appellant, the Moragne plaintiff's loved one had been killed while working aboard a vessel in navigable waters within a state's territorial waters. See id. at 376. Although no federal statute authorized recovery for the widow, the Supreme Court nevertheless allowed her suit to proceed. In order to do so, the Supreme Court said it was compelled to overrule The Harrisburg, stare decisis considerations notwithstanding. In broad language, Justice Harlan, writing for a unanimous Court, announced the rule of Moragne: "We accordingly overrule

The Harrisburg, and hold that an action does lie under general maritime law for death caused by violation of maritime duties." Id. at 409.

Two aspects of the Moragne opinion are of pivotal importance in the case at bar. First, the court explicitly announced that a cause of action exists for a "violation of maritime duties," not just for "unseaworthiness." Had the Court sought to limit its holding to unseaworthiness, it could have easily done so. Second, and relatedly, had the Supreme Court sought only to allow the plaintiff to recover in her unseaworthiness-based wrongful death action, it could easily have distinguished The Harrisburg. After all, The Harrisburg held that there was no general maritime law cause of action for negligence-based wrongful death suits, but The Harrisburg said nothing about the presence or absence of a general maritime law cause of action for unseaworthiness-based wrongful death suits, since the unseaworthiness theory of liability did not enter the Supreme Court's lexicon until fifty-eight years after The Harrisburg was handed down. But the Supreme Court consciously, and with much fanfare,[1] overruled The

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[1] Justice Harlan's opinion in Moragne devotes seven fascinating pages to the "very weighty considerations" of stare decisis that argued against overruling The Harrisburg. See Moragne , 398 U.S. at 403-09. Anyone who reads this discussion comes away from it profoundly impressed with Justice Harlan's reverence for precedent and his reluctance to cast aside a controlling precedent in the absence of compelling reasons to do so. Indeed, scholars have long appreciated Justice Harlan's particularly hardy reverence for precedent, see, e.g., Louis R. Cohen, A Biography of the Second Justice Harlan, 91 Mich. L. Rev. 1609, 1612 (1992) (reviewing Tinsley E. Yarbrough, John Marshall Harlan: Great Dissenter of the Warren Court (1992)), and deep commitment to the principle of judicial restraint, see, e.g., Stephen M. Dane, "Ordered Liberty" and Self-Restraint: The Judicial Philosophy of the Second Justice Harlan, 51 U. Cin. L. Rev. 545 (1982).

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Harrisburg instead of distinguishing it.[2] In so doing, the Court must have believed that there was no principled basis

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The majority today reads Moragne as having created a cause of action for unseaworthiness-based wrongful death suits, but not negligence-based wrongful death suits. Plainly, however, if the Moragne Court had favored such a distinction, Justice Harlan could have simply distinguished The Harrisburg by noting that it involved a negligence-based wrongful death cause of action, whereas Moragne involved an unseaworthiness-based wrongful death cause of action. By doing so, the Court could have avoided the unseemliness involved in overturning a well-established precedent. Two possibilities follow from the majority's holding today: Either Moragne's overruling of The Harrisburg was mere dicta or Justice Harlan and his eight colleagues lacked the capacity to distinguish a case on its facts. I find neither notion plausible. A more satisfying reading of Moragne's treatment of The Harrisburg is that the unanimous Court felt compelled to overrule The Harrisburg's holding that general maritime law did not create a negligence-based wrongful death cause of action, and that the Court saw no logical basis for holding that general maritime law recognizes unseaworthiness-based wrongful death suits, but not negligence-based wrongful death suits.

[2] The majority contends that Moragne had to overrule The Harrisburg because The Harrisburg's "rationale was applicable to all forms of wrongful death." Maj. op. at 15 n.7. In so doing, the majority emphasizes The Harrisburg's reliance on Insurance Co. v. Brame, 95 U.S. 754 (1877), which held that under the common law, "actions for injuries to the person abate by death," see id. at 759. I fail to see why Brame alters the analysis. At the time of The Harrisburg, the common law recognized no wrongful death cause of action. Among the possible theories of liability, the only candidate for a wrongful death recovery action would have been negligence because, as I noted above, the strict-liability theory of wrongful death recovery would not make its way into American admiralty jurisprudence for another fifty-eight years. It is therefore not surprising that The Harrisburg Court considered the question before it in the narrowest of terms: "Can a suit in admiralty be maintained in the courts of the United States to recover damages for the death of a human being on the high seas, or waters navigable from the sea, caused by negligence, in the absence of an act of congress or a statute of a state giving a right of action therefor?" 119 U.S. at 204

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for distinguishing between negligence-based wrongful death suits and unseaworthiness-based wrongful death suits under general maritime law. Yet that is precisely the distinction that the majority draws today. In order to fully understand Moragne, courts have often looked to the three famous "anomalies" that The Harrisburg and pre-Moragne developments had wrought. See, e.g., Miller v. American President Lines, 989 F.2d 1450, 1458 (6th Cir. 1993); Bodden v. American Offshore, Inc., 681 F.2d 319, 323 (5th Cir. 1982). The Moragne Court was terribly troubled by these inconsistencies that had emerged in admiralty law, whereby a seaman might recover damages if injured within territorial waters, but not if killed within those same waters; whereby a seaman's estate could recover in an unseaworthiness action if he was killed on the high seas but not if killed within a state's territorial waters; and whereby a seaman's estate could not recover for wrongful death if he were killed within territorial waters, but a longshoreman's estate could. See id. at 395-96. By overruling The Harrisburg and removing these anomalies, the Court saw itself as assuring "uniform vindication of federal policies [by] removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts." Id. at 401.

The majority concludes that Moragne's three anomalies are not directly implicated by the instant case. I disagree. The purpose of Moragne was to allow individuals who are, for all intents and purposes, equally situated, to obtain equal recoveries in the event of their

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(emphasis added). Thus, the majority's view appears to be that the Moragne Court read The Harrisburg to preclude a cause of action that had not yet been invented.

deaths. In other words, happenstance should not determine whether an individual's heirs have a cause of action in the event of his untimely death. But, as the majority points out, Appellant's misfortune here is purely driven by happenstance. Maj. op. at 17-19. Had Garris been a seaman, Appellant would have had a wrongful death cause of action under the Jones Act or general maritime law. But because Garris was a longshoreman, the Jones Act is inapplicable, and Appellant is now unable to bring any suit under general maritime law. Had Garris's death resulted from the actions of the ship's owner, Appellant could have recovered under the Longshore & Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 905(b). But because his death allegedly resulted from the actions of subcontractors working aboard the ship, such a remedy is not available to Appellant. I am hardly alone in understanding Moragne's anomalies to be directly implicated by the set of facts presented in the instant case. To Grant Gilmore and Charles Black, two of their generation's towering legal minds, it "clearly follow[ed]" from Moragne that "The Moragne remedy . . . . provides recovery for deaths caused by negligence as well as for deaths caused by unseaworthiness." Grant Gilmore & Charles L. Black, Jr. The Law of Admiralty 368 (2d ed. 1974).

In 1980, a Ninth Circuit opinion cited page 368 of the Gilmore and Black treatise and largely agreed with those scholars' reading of Moragne. See Nelson v. United States, 639 F.2d 469, 473 (9th Cir. 1980). While observing that no post-Moragne published opinion had decided whether a Moragne suit "could be based on negligence as well as unseaworthiness," the court expressed sympathy for Gilmore and Black's view that the obvious implication of Moragne was that negligence suits were covered under the general maritime law. The Court held that the "need for

uniformity in maritime wrongful death actions requires extension of Moragne to cover claims based on negligence, to the exclusion of state wrongful death statutes." Id. The majority reads Nelson as recognizing "that Moragne did not itself create a general maritime law cause of action for wrongful death based upon negligence." Maj. op. at 13. Although the question is admittedly close, I read no such analysis into Nelson, and believe the majority places too much emphasis on Nelson's use of the word "extension."[3] Indeed, Nelson's invocation of page 368 of Gilmore and Black suggests a contrary view.

As the majority recognizes, the Second Circuit has also held that Moragne created a negligence-based cause of action as well as an unseaworthiness-based cause of action. See Wahlstrom v. Kawasaki Heavy Indus., 4 F.3d 1084 (2d Cir. 1993). The Second Circuit correctly held that the Moragne Court "did not limit the new right of recovery to unseaworthiness claims, but instead established a general remedy for wrongful death under maritime law." Id. at 1088-89. The majority's assertion that no court has adopted Wahlstrom's reasoning is misleading. Wahlstrom is consistent with Nelson, and Wahlstrom was the last circuit court case to consider the issue that is before this Court today.

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[3] When an opinion is obviously applicable to a nearly identical set of facts, it is nevertheless accurate to say that the opinion still must be "extended" to cover the second set of facts. Sometimes, a minimal extension of the prior precedent to a situation clearly controlled by that precedent even warrants the publication of a subsequent opinion. See, e.g., Boulahanis v. Board of Regents, 198 F.3d 633 (7th Cir. 1999) (extending Kelley v. Board of Trustees, 35 F.3d 265 (7th Cir. 1994), while recognizing that Kelley plainly controlled the case at bar).

The majority seeks solace in an Eleventh Circuit case, but that reliance is somewhat misplaced. Admittedly, the Eleventh Circuit has held that Moragne does not create a negligence-based wrongful death cause of action "where a cause of action exists for wrongful death under DOHSA [the Death on the High Seas Act]." Ford v. Wooten, 681 F.2d 712, 716 (11th Cir. 1982). But it is undisputed that Appellant has no DOHSA remedy here, because Garris's injury occurred in territorial waters. In Ford, the Eleventh Circuit premised its opinion upon a balancing of interests where the interest in uniformity favored granting a remedy and "consistency with federal remedial schemes" favored withholding a remedy. The court held that "[a]t least where statutory remedies exist, we deem consistency with the federal remedial schemes to be more important than the somewhat limited loss of uniformity." Id. (emphasis added). Notably, a general maritime law cause of action would have conflicted with DOHSA because DOHSA "already provides a cause of action for death due to negligence." Id. Where, as in the case at bar, no federal statute authorizes or bars a recovery from the third party alleged to have caused Garris's death, there is nothing to balance the interest in uniformity, so Moragne creates a cause of action.[4]

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[4] Both parties invoke the Fifth Circuit's precedents as supporting their respective readings of Moragne. Surprisingly, both parties appear to be correct. In Ivy v. Security Barge Lines, Inc., 606 F.2d 524, 527 (5th Cir. 1979) (en banc), the Fifth Circuit held:

> Other reasons, somewhat more complex, appear to preclude interpreting the Jones Act as being supplemented by a Moragne-engendered negligence action for damages if (but only if) death occurs in territorial waters or on land. Moragne did not create or even discuss an action for negligence; it

(continued)

Any lingering doubts about whether Moragne created a negligence-based wrongful death cause of action were laid to rest by the Supreme Court in 1996. In Yamaha Motor Corp., 516 U.S. at 199, the Court held that Moragne did not preempt state law remedies for wrongful death resulting from injuries to nonseamen in territorial waters. But it is one of Yamaha's footnotes, not its holding, that

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> dealt only with death occasioned by unseaworthiness. The suggestion that the Jones Act measure of damages can be supplemented by the Moragne-cause-of-action-Gaudet-damages rule will not bear analysis . . . .

A decade later, the Fifth Circuit appears to have reversed course, observing that in "Moragne, the Supreme Court recognized a wrongful death action for negligence and unseaworthiness under the general maritime law." Miles v. Melrose, 882 F.2d 976, 985 (5th Cir. 1989), aff'd sub nom. Miles v. Apex Marine Corp., 498 U.S. 19 (1990). Ordinarily, an en banc opinion would trump a panel opinion, but that might not be the case where, as here, the panel opinion post-dates the en banc opinion or where, as here, only the panel opinion was affirmed by the Supreme Court. The Fifth Circuit thus appears to find itself on both sides of a circuit split.

Nevertheless, the majority opinion cites Ivy as the current Fifth Circuit law. Maj. op. at 13. Assuming, arguendo, the correctness of that assessment, I would emphasize that Ivy's holding is inapplicable to the case at bar. The Ivy court's analysis was animated by the problem of double recoveries for someone under Moragne and the Jones Act. Appellant, and those similarly situated, are not eligible for such a double recovery, since the Jones Act covers seamen, but not longshoremen. The Longshore & Harbor Workers' Compensation Act (LHWCA), which covers Garris, does not provide for a wrongful death cause of action against a subcontractor. Hence, there is no risk that Appellant might recover twice, unless one construes funeral benefits from an employer and wrongful death benefits from a third-party subcontractor to be a double recovery.

definitively resolves the instant case. Footnote 11 reads in pertinent part:

> While unseaworthiness was the doctrine immediately at stake in Moragne, the right of action, as stated in the Court's opinion, is "for death caused by violation of maritime duties." . . . See . . . Kermarec, 358 U.S., at 630, 79 S.Ct., at 409-410 (negligence). See also G. Gilmore & C. Black, The Law of Admiralty 368 (2d ed. 1975).

Id. at 214 n.11. This footnote is a crucial clue for at least two reasons. First, the Court emphasized that the Moragne cause of action covered something in addition to unseaworthiness causes of action, and the citation to Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630 (1959), makes it rather clear that negligence causes of action for wrongful death were part of that "something" encompassed by the broader language "violation of maritime duties." See Steven F. Friedell, Searching for a Compass: Federal and State Law Making Authority in Admiralty, 57 La. L. Rev. 825, 835 (1997) ("[T]he holding in Moragne was not limited to unseaworthiness. The Court held that 'an action does lie under general maritime law for death caused by violation of maritime duties.' As recognized by the Yamaha Court, this encompasses not only unseaworthiness but also products liability and negligence.").

Second, and perhaps even more importantly, the Supreme Court cited favorably to the aforementioned page 368 of the Gilmore and Black treatise, where the authors concluded that the Moragne remedy "provides recovery for deaths caused by negligence as well as for deaths caused by

unseaworthiness." Gilmore & Black, supra, at 368. This citation, combined with the text of footnote 11 and the citation to Kermarec, make it clear that the Yamaha Court understood Moragne's remedy as encompassing claims like Appellant's. Although footnote 11 is dicta, it deserves special solace from this Court because it clarifies the Supreme Court's understanding of one of its own opinions. See United States v. City of Hialeah, 140 F.3d 968, 974 (11th Cir. 1998) ("Even though that statement by the Supreme Court in Local 93 was dictum, it is of considerable persuasive value, especially because it interprets the Court's own precedent.").

III.

Ultimately, the agreement between my view and the majority's is far more important than our points of contention. It goes without saying that Appellant has a cause of action under either reading of Moragne. I write separately to emphasize that in my view Appellant's cause of action is not a new ship that has suddenly appeared on the horizon. Rather, Appellant's cause of action has been lurking just under the surface for quite some time. For the foregoing reasons, I concur in the judgment.

FILED: June 1, 2000
DISSENT FILED: June 2, 2000

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-2368
(CA-98-382-2)

CELESTINE GARRIS, Administrator of the estate of Christopher Garris, deceased,

Plaintiff - Appellant,

versus

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION,

Defendant - Appellee,

and

E. T. GRESHAM, INCORPORATED,

Defendant.

ON PETITION FOR REHEARING EN BANC

Appellees filed a petition for rehearing en banc.

A member of the Court requested a poll on the petition for rehearing en banc. The poll failed to produce a

majority of judges in active service in favor of rehearing en banc. Judges Widener and Niemeyer voted to rehear the case en banc. Chief Judge Wilkinson and Judges Murnaghan, Wilkins, Luttig, Williams, Michael, Motz, Traxler, and King voted against rehearing en banc.

The Court denies the petition for rehearing en banc.

Entered at the direction of Judge Williams for the Court.

For the Court

/s/ Patricia S. Connor
Clerk

WIDENER, Circuit Judge, dissenting:

I respectfully dissent to the denial of reharing en banc in this case. I would grant rehearing en banc in this case of first impression.

The panel opinion relies almost exclusively on the opinion in Moragne v. States Marine Lines, Inc., 398 U.S. 3u75 (1970). In Moragne, the Court addressed discrepancies "between the remedies for deaths covered by the Death on the High Seas Act and for deaths that happen to fall within a state wrongful death statute not encompassing unseaworthiness. . . ." 398 U.S. at 399. Finding that Congress could not have foreseen these discrepancies, the Court concluded that the Death on the High Seas Act did not foreclose any nonstatutory federal remedies that would effectuate the policies of general maritime law. Moragne, 398 U.S. at 399-400.

With respect to longshoremen and other harbor workers, the Moragne Court found that a claim for wrongful death based upon the unseaworthiness of a vessel was viable because the unseaworthiness doctrine had been extended to longshoremen as the principal vehicle for recovery of injury or death while performing work on a vessel, Moragne, 398 U.S. at 399, on the authority of Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946). Sieracki extended to land-based stevedores the right given by maritime law to seamen to recover against the ship owner, without the need of proving negligence, for injuries caused by the unseaworthiness of the vessel. Following Sieracki, courts made awards to longshoremen on the basis of unseaworthiness. And, as noted, the Moragne Court specifically relied on the Sieracki decision to extend the coverage of a wrongful death cause of action based on unseaworthiness to a longshoreman.

In 1972, Congress enacted various amendments to the Longshore and Harbor Workers' Compensation Act. As part of these amendments, Congress added 33 U.S.C. § 905(b), which specifically eliminates the right of longshoremen and harbor workers to recover against the vessel on the basis of unseaworthiness. See Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 165 (1981) (longshoreman's right to recover for unseaworthiness abolished); Herbert R. Baer, Admiralty Law of the Supreme Court § 6-17 at 90-91 (2d ed. Supp. 1977). The legislative history mentions Sieracki by name and rejects the holding of that case to the extend that it created an absolute duty of seaworthiness to "longshoremen and others who performed work on the vessel." H.R. Robert E. Payne. No. 92-1441 (1972), reprinted in 1972 U.S.C.C.A.N. 4698, 4702. Thus, because Moragne relies on Sieracki to extend a wrongful death action based on unseaworthiness to longshoremen and harbor workers, to the extend of that reliance Moragne was superceded and reversed by the 1972 amendments to the act. Thus, the panel opinion's reliance on this portion of Moragne is misplaced.

The legislative history of the 1972 amendments to the Act are particularly relevant to our decision in this case. It is clear from this history that Congress intended to "place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called,

such as 'unseaworthiness', 'non-delegable duty', or the like." 1972 U.S.C.C.A.N. 4698, 4703.[1]

In spite of this explicit expression of Congressional intent, the panel opinion creates a new cause of action which is exactly the opposite of that which Congress intended. First, the decision creates a "special maritime theory of liability" — one for wrongful death based on negligence. Second, the decision gives an employee injured aboard a vessel a cause of action that a Virginia worker on shore would not have.

In a case such as this in which Congress has made its intention explicit, I suggest it is beyond our warrant to substitute our notions of public policy for that of Congress. Local 1976, United Bhd. of Carpenters and Joiners v. N.L.R.B., 357 U.S. 93, 100 (1958) ("[I]t is the business of Congress to declare policy and not this Court's. The judicial function is confined to applying what Congress has enacted after ascertaining what it is that Congress has enacted.") "Whether the federal policy is a wise one is for the Congress and the Chief Executive to determine. Once they have spoken, it is our function to enforce their will." United States v. Georgia Pub. Serv. Comm'n, 371 U.S. 285, 293 (1965).

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[1] As Scindia points out both the Senate and House Committee Reports agree on this language. Scindia, 451 U.S. at 165-166 n.13.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

CELESTINE GARRIS,
Administratrix of the ESTATE OF
CHRISTOPHER GARRIS, deceased,

Plaintiff,

v. **Civil Action No. 2:97-cv-382**

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION,
and
E.T. GRESHAM, INC.,

Defendants.

OPINION AND FINAL ORDER

This matter comes before the Court on Defendants' Motions to Dismiss for Failure to State a Claim. For the reasons stated below, the Court finds that no cause of action exists, under general maritime law, for death of a nonseaman in state territorial waters resulting from negligence. Defendants' motions to dismiss are GRANTED, and Plaintiff's federal claims are DISMISSED with prejudice. The Court declines to exercise supplemental jurisdiction under Title 28, United States Code Sections 1367(a) and (c)(3) over Plaintiff's Virginia Wrongful Death Act claim; the state claim is therefore DISMISSED without prejudice.

I. Factual Background

Celestine Garris, as Administratrix of the Estate of Christopher Garris, seeks damages relating to the death of Christopher Garris. Plaintiff's claims are brought under both general maritime law and the Virginia Wrongful Death Act. While the parties do not agree on the actual series of events which led to the death of Christopher Garris, those factual discrepancies need not be resolved for purposes of ruling on Defendants' motions.

According to the Plaintiff, on April 8, 1997, the decedent was performing sandblasting work on the USNS MAJOR STEPHEN W. PLESS for Mid-Atlantic Coatings, Inc. ("Mid-Atlantic") through a temporary agency. Norfolk Shipbuilding & Drydock Company ("NORSHIPCO"), a ship repair company who had contracted to perform work on the vessel, sub-contracted the sandblasting work to Mid-Atlantic. To accomplish the sand-blasting, a pre-loaded hopper of sandblast shot was lifted from the pier to the opening of a silo located on the deck of the vessel. A door on the underside of the hopper was then opened to release the shot, depositing the shot in the opening of the silo. The particular silo in question was approximately 30 feet in height. Christopher Garris fell from the top of the silo onto the deck of the vessel, sustaining fatal injuries in the fall. Garris passed away on April 9, 1997.[1] The USNS

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[1] The Plaintiff received death benefits under the Longshore and Harbor Workers' Compensation Act, and filed suit in state court seeking additional recovery. Under Virginia law, no general maritime cause of action exists for negligence for the death of a nonseaman in state territorial waters. See, e.g., Brown v. Brown, 226 Va. 320, 327, 309 S.E.2d 586, 590 (1983). Plaintiff nonsuited the state court action following the filing of a demurrer and miscellaneous other motions by Defendants. The instant action was filed shortly thereafter.

MAJOR STEPHEN W. PLESS was docked in Norfolk, Virginia, in the navigable waters of the United States of America at the time of the incident.

Plaintiff seeks damages under general maritime law for funeral expenses, pain and suffering of the decedent, loss of society, and loss of services. In a pendant state claim, Plaintiff seeks damages pursuant to the Virginia Wrongful Death Act.

II. Analysis

A. Standard of Review

In a Motion to Dismiss, the complaint is construed in the light most favorable to the plaintiff, and the plaintiff's allegations are taken as true. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Jenkins v. McKeither, 395 U.S. 411,421 (1969). Nonetheless, the Fourth Circuit has held that "[c]onclusory allegations regarding the legal effect of the facts alleged" need not be accepted as true. Labram v. Havel, 43 F.3d 918, 921 (4th Cir. 1995). In order for the Court to grant a motion to dismiss, it must appear to a certainty that the plaintiff cannot prove *any* facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Martin Marietta Corp. V. International Telecommunications Satellite Org., 991 F.2d 94, 97 (4th Cir. 1993).

B. Negligence Action Under General Maritime Law

The sole issue before this Court is whether Plaintiff may properly maintain a negligence action under general maritime law. The Supreme Court first recognized a general maritime law cause of action for death occurring from a breach of maritime duties in Moragne v. States

Marine Lines, Inc., 398 U.S. 375 (1970). Plaintiff argues that in the Moragne decision, the Supreme Court intended to establish the propriety of both unseaworthiness and negligence claims under general maritime law. Defendants submit that the Supreme Court's recognition in Moragne was limited to unseaworthiness claims, and that general maritime law has not been extended to include a negligence cause of action for the wrongful death of a nonseaman in state territorial waters. See Ford v. Wooten, 681 F.2d 712, 715 (11th Cir. 1982) (Hoffman, District Judge sitting by designation) (recognizing Moragne "pertained only to an unseaworthiness claim"); Minnick v. United States, 767 F.Supp. 115, 118-119 (E.D. Va. 1990) (noting "Moragne created a general maritime wrongful death cause of action for unseaworthiness").

The Moragne decision was a necessary reaction to an antiquated common law holding. In rendering the decision it did, the Supreme Court filled an obvious void that materialized following the enactment of the Death on the High Seas Act and the Jones Act. Prior to Moragne, no federal cause of action existed for wrongful death in state territorial waters due to unseaworthiness. The Supreme Court has never applied its holding in Moragne to negligence claims, although some jurisdictions have expanded the decision to allow negligence actions under general maritime law, or otherwise held the decision intended to provide a general maritime law action for both unseaworthiness and negligence. See, e.g., Nelson v. United States, 639 F.2d 469, 473 (9th Cir. 1980) (holding the need for uniformity requires extension of Moragne to negligence claims); Miles v. Melrose, 882 F.2d 976 (5th Cir. 1989) (noting, without citation, that Moragne recognized actions for both unseaworthiness and negligence.); Neil v. McGinnis, 716 F.Supp. 996 (E.D. Ky. 1989); Garner v. Dravo Basic Materials, 768 F.Supp. 192

(S.D. W.Va. 1991); Cantore v. Blue Lagoon Water Sports, Inc., 799 F.Supp. 1151 (S.D. Fla. 1992); but see generally Ivy v. Security Barge Lines, Inc., 606 F.2d 524 (5th Cir. 1979).

The 1972 amendments to the Longshore and Harbor Workers' Compensation Act superseded the holding in Moragne, foreclosing a general maritime law wrongful death action by the survivors of a longshoreman or harbor worker. See 33 U.S.C. §§ 901-950; Miles v. Apex Marine, 498 U.S. 19, 28 (1990). Defendants submit that this responsive legislative action cautions against the extension of Moragne beyond unseaworthiness, an argument with which the Court is inclined to agree. The Court, however, must also take into consideration the Supreme Court's more recent decision in Yamaha Motor Corporation v. Calhoun, 516 U.S. 199 (1996), as well as decisions previously rendered by other judges of this district.

In Minnick v. United States, supra, the parties assumed a negligence action could be pursued under general maritime law. Judge Clarke, in reviewing Moragne and the cases interpreting Moragne, found the assumption to be incorrect, noting that Moragne created only a general maritime wrongful death cause of action for unseaworthiness. Minnick, 767 F.Supp. at 117-18.[2] Similarly, Judge Hoffman, sitting on the Eleventh Circuit by designation, considered "whether Moragne should be extended to permit recovery under general maritime law for wrongful death caused by negligence. Ford, 681 F.2d at 716. Judge Hoffman, writing for a panel of the Eleventh

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[2] Judge Clarke further found that the plaintiff in Minnick could pursue a negligence action under LHWCA, allowing the plaintiff leave to amend to assert the appropriate claim. Minnick, at 117-18.

Circuit, held that Moragne pertained only to unseaworthiness claims, and that subsequent Supreme Court decisions supported this finding. Id. at 715. Although the decisions in Minnick and Ford predated the Supreme Court's opinion in Yamaha, the Court finds the reasoning of Judges Hoffman and Clarke in those decisions remains sound.

Yamaha held the general maritime wrongful death action recognized in Moragne did not preempt state remedies for non-seaman deaths in territorial waters. Id. at 215. In rendering this decision, the Supreme Court created some confusion regarding the current status of the law. The Court noted in footnote seven, that:

> If Moragne's wrongful death action did not extend to non-seafarers like Natalie [injured in a jet ski accident], one could hardly argue that Moragne displaced the state law remedies the Calhouns seek. Lower courts have held that Moragne's wrongful death action extends to non-seafarers. (Citations omitted). *We assume, for purposes of this decision,* the correctness of that position. Similarly, as in prior encounters, we assume *without deciding* that Moragne also provides a survival action. [Citation omitted.] The question we confront is not what Moragne added to the remedial arsenal in maritime cases, but what, if anything, it removed from admiralty's stock. [Emphasis added.]

Yamaha, 516 U.S. at 209, n. 7. Plaintiff also relies on footnote eleven in an attempt to persuade the Court that Moragne recognized negligence claims under general

maritime law in addition to unseaworthiness claims. In footnote eleven, Yamaha correctly notes that the right of action, as stated in Moragne, established a cause of action "for death caused by violations of maritime duties." Id. at 214, n. 11. Nonetheless, unseaworthiness was the doctrine at stake before the Court in Moragne, not negligence. A thorough analysis of Yamaha reveals that in Yamaha, the Supreme Court reserved the issue of whether a wrongful death action sounding in negligence exists under general maritime law.[3]

The generality with which the Court spoke in Moragne is not sufficient to establish a general maritime law cause of action for negligence in light of Yamaha's reservation of the issue, and the absence of any Supreme Court decision applying Moragne to negligence. Neither the arguments nor the case law set forth by Plaintiff are persuasive in her attempt to have this Court extend the application of general maritime law to negligence actions.

III. Conclusion

Accordingly, Defendants' Motions to Dismiss are **GRANTED** and Plaintiff's claims under general maritime law are **DISMISSED** with prejudice. The Court declines to exercise supplemental jurisdiction over Plaintiff's pendant state law claims, and the same are **DISMISSED** without prejudice.

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[3] Defendants also offer authority from the Virginia Supreme Court, in which the Court recognized that claims under general maritime law were restricted to claims of unseaworthiness. See Brown v. Brown, 226 Va. 320 (1983).

The Clerk is **REQUESTED** to send a copy of this Opinion and Order to counsel for the Plaintiff and counsel for the Defendant.

It is so **ORDERED**.

/s/ Jerome B. Friedman

United States District Judge

August 31, 1998
Norfolk, Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

CELESTINE GARRIS. Administratrix
of the ESTATE OF CHRISTOPHER
GARRIS, deceased.

Plaintiff,

v. CIVIL ACTION NO. 2:97-CV-382

NORFOLK SHIPBUILDING &
DRYDOCK CORPORATION,
and
E. T. GRESHAM, .INC.,

Defendants.

COMPLAINT

NOW COMES the plaintiff, Celeste Garris, Administratrix of the Estate of Christopher Garris, deceased, by counsel, and for her Complaint, states as follows:

1. This is a maritime and admiralty action within the meaning of Rule 9(h) and 28 U.S.C. § 1333.

2. The plaintiff is the mother of, and Administratix of the Estate of Christopher Garris, deceased, who sustained fatal injuries on April 8, 1997, while working aboard the USNS MAJ. STEPHEN W. PLESS, while the vessel was berthed at Norfolk Shipbuilding & Drydock Corporation ("NORSHIPCO"),

Norfolk, Virginia, in the navigable waters of the United States of America.

3. The plaintiff believes that the plaintiff's deceased was employed by Tidewater Temps, Inc. ("Tidewater"} to perform sand blasting work for Mid-Atlantic Coatings, Inc. ("Mid. Atlantic"), a sub-contractor of NORSHIPCO.

4. The defendant, NORSHIPCO. is a ship repair company who had contracted to perform certain work on the USNS MAJ. STEPHEN W. PLESS.

5. The defendant, E. T. Gresham, Inc. ("Gresham"), was a sub-contractor of either Mid-Atlantic or NORSHIPCO, and had responsibilities with regard to the provision of and/or operation of a crane alongside the USNS MAJ. STEPHEN W. PLESS.

6. On April 8, 1997, while working aboard the USNS MAJ. STEPHEN W. PLESS, the plaintiff's deceased sustained injuries and died on April 9, 1997, as a result of the negligence of the defendants, jointly and severally.

7. The plaintiff demands damages pursuant to the general maritime law for funeral expenses, pain and suffering of the decedent prior to his death, loss of society and loss of services, and for damages pursuant to the Virginia Wrongful Death Act, § 8.01-52.

WHEREFORE, the plaintiff prays for judgment against the defendants, jointly and severally, in the amount of Two Million and 00/100 Dollars ($2,000,000.00).

CELESTINE. GARRIS.
Administratrix
of the ESTATE OF
CHRISTOPHER
GARRIS, deceased

/s/ John R. Crumpler, Jr.
By_____

The Longshore and Harbor Workers Compensation Act, 33 U.S.C.A. §§ 903(a), 904, 905(a)-(b), 909 (West 1986).

§ 903. Coverage.

(a) Disability or death; injuries occurring upon navigable waters of United States. Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

§ 904. Liability for compensation.

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor.

(b) Compensation shall be payable irrespective of fault as a cause for the injury.

§ 905. Exclusiveness of liability.

(a) Employer liability; failure of employer to secure payment of compensation. The liability of an employer

prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

(b) Negligence of vessel. In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such

person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

§ 909. Compensation for death.

If the injury causes death, the compensation therefore shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

(a) Reasonable funeral expenses not exceeding $3,000.

(b) If there be a widow or widower and no child of the deceased, to such widow or widower 50 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of 16 2/3 per centum of such wages for each such child; in case of the death or remarriage of such widow or widower, if there be one surviving child of the deceased employee, such child shall have his compensation increased to 50 per centum of such wages, and if there be more than one surviving child of the deceased employee, to such children, in equal parts, 50 per centum of such wages increased by 16 2/3 per centum of such wages for each child in excess of one: Provided, That the total amount payable shall in

no case exceed 66 2/3 per centum of such wages. The deputy commissioner having jurisdiction over the claim may, in his discretion, require the appointment of a guardian for the purpose of receiving the compensation of a minor child. In the absence of such a requirement the appointment of a guardian for such purposes shall not be necessary.

(c) If there be one surviving child of the deceased, but no widow or widower, then for the support of such child 50 per centum of the wages of the deceased; and if there be more than one surviving child of the deceased, but no widow or dependent husband, then for the support of such children, in equal parts 50 per centum of such wages increased by 16 2/3 per centum of such wages for each child in excess of one: Provided, That the total amount payable shall in no case exceed 66 2/3 per centum of such wages.

(d) If there be no surviving wife or husband or child, or if the amount payable to a surviving wife or husband and to children shall be less in the aggregate than 66 2/3 per centum of the average wages of the deceased; then for the support of grandchildren or brothers and sisters, if dependent upon the deceased at the time of the injury, and any other persons who satisfy the definition of the term "dependent" in section 152 of Title 26, but are not otherwise eligible under this section, 20 per centum of such wages for the support of each such person during such dependency and for the support of each parent, or grandparent, of the deceased if dependent upon him at the time of the injury, 25 per centum of such wages during such dependency. But in no case shall the aggregate amount payable under this subdivision exceed the difference between 66 2/3 per centum of such wages and

the amount payable as hereinbefore provided to widow or widower and for the support of surviving child or children.

(e) In computing death benefits, the average weekly wages of the deceased shall not be less than the national average weekly wage as prescribed in section 906(b) of this title, but--

(1) the total weekly benefits shall not exceed the lesser of the average weekly wages of the deceased or the benefit which the deceased employee would have been eligible to receive under section 906(b)(1) of this title; and

(2) in the case of a claim based on death due to an occupational disease for which the time of injury (as determined under section 910(i) of this title) occurs after the employee has retired, the total weekly benefits shall not exceed one fifty-second part of the employee's average annual earnings during the 52-week period preceding retirement.

(f) All questions of dependency shall be determined as of the time of the injury.

The Virginia Workers' Compensation Act, Va. Code Ann. §§ 65.2-302, -307, -512, -515, -516 (Michie 1995 & Supp. 1999).

§ 65.2-302. Statutory employer.

A. When any person (referred to in this section as "owner") undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (referred to in this section as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable

to pay to any worker employed in the work any compensation under this title which he would have been liable to pay if the worker had been immediately employed by him.

B. When any person (referred to in this section as "contractor") contracts to perform or execute any work for another person which work or undertaking is not a part of the trade, business or occupation of such other person and contracts with any other person (referred to in this section as "subcontractor") for the execution or performance by or under the subcontractor of the whole or any part of the work undertaken by such contractor, then the contractor shall be liable to pay to any worker employed in the work any compensation under this title which he would have been liable to pay if that worker had been immediately employed by him.

C. When the subcontractor in turn contracts with still another person (also referred to as "subcontractor") for the performance or execution by or under such last subcontractor of the whole or any part of the work undertaken by the first subcontractor, then the liability of the owner or contractor shall be the same as the liability imposed by subsections A and B of this section.

§ 65.2-307. Employee's rights under Act exclude all others.

A. The rights and remedies herein granted to an employee when his employer and he have accepted the provisions of this title respectively to pay and accept compensation on account of injury or death by accident shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, at common law or otherwise, on account of such injury, loss of service or death.

B. Notwithstanding this exclusion, nothing in the Act shall bar an employer from voluntarily agreeing to pay an employee compensation above and beyond those benefits provided for in the Act. Nothing herein, however, shall be deemed to affect or alter any existing right or remedy of the employer or employee under the Act.

§ 65.2-512. Compensation to dependents of an employee killed; burial expenses.

A. If death results from the accident within nine years, the employer shall pay, or cause to be paid, compensation in weekly payments equal to 66 2/3 percent of the employee's average weekly wages, but not more than 100 percent of the average weekly wage of the Commonwealth as defined in § 65.2-500 nor less than 25 percent of the average weekly wage as defined therein:

1. To those persons presumed to be wholly dependent upon the deceased employee as set forth in subdivisions A 1, A 2, and A 3 of § 65.2-515, for a period of 500 weeks from the date of injury; or

2. If there are no total dependents pursuant to subdivision A 1, A 2, or A 3 of § 65.2-515, to those persons presumed to be wholly dependent as set forth in subdivision A 4 of § 65.2-515, and to those determined to be wholly dependent in fact, for a period of 400 weeks from the date of injury; or

3. If there are no total dependents, to partial dependents in fact, for a period of 400 weeks from the date of injury.

B. The employer shall also pay burial expenses not exceeding $10,000 and reasonable transportation expenses for the deceased not exceeding $1,000.

C. Benefits shall be divided equally among total dependents, to the exclusion of partial dependents. If there are no total dependents, benefits shall be divided among partial dependents according to the dependency of each upon the earnings of the employee at the time of the injury, in the proportion that partial dependency bears to total dependency.

D. If benefits are terminated as to any member of a class herein, that member's share shall be divided among the remaining members of the class proportionately according to their dependency.

E. When weekly payments have been made to an injured employee before his death, the compensation to dependents shall begin from the date of the last of such payments but shall not continue for a period longer than specified in subsection A of this section.

§ 65.2-515. Persons conclusively presumed to be wholly dependent.

A. The following persons shall be conclusively presumed to be dependents wholly dependent for support upon the deceased employee:

1. A wife upon a husband whom she had not voluntarily deserted or abandoned at the time of the accident or with whom she lived at the time of his accident, if she is then actually dependent upon him;

2. A husband upon a wife whom he had not voluntarily deserted at the time of the accident or with whom he lived at the time of her accident, if he is then actually dependent upon her;

3. A child under the age of eighteen upon a parent and a child over such age if physically or mentally incapacitated from earning a livelihood or a child under the age of twenty-three if enrolled as a full-time student in any accredited educational institution; and

4. Parents in destitute circumstances, provided there be no total dependents pursuant to other provisions of this section.

B. As used in this section, the term "child" shall include a stepchild, a legally adopted child, a posthumous child, and an acknowledged illegitimate child, but shall not include a married child; and the term "parent" shall include stepparents and parents by adoption.

§ 65.2-516. Other cases of dependency.

In all other cases questions of dependency in whole or in part shall be determined in accordance with the facts as the facts are at the time of the accident; but no allowance shall be made for any payment made in lieu of board and lodging or services and no compensation shall be allowed unless the dependency existed for a period of three months or more prior to the accident.

Supreme Court, U.S.
FILED
OCT 27 2000
OFFICE OF THE CLERK

No. 00-346

IN THE

Supreme Court of the United States

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION,

Petitioner,

v.

CELESTINE GARRIS, Administratrix of the Estate of CHRISTOPHER GARRIS, Deceased,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is there a general maritime cause of action for wrongful death that includes liability premised on negligence?

LIST OF PARTIES

All parties to the proceeding below are identified in the caption of this case except E.T. Gresham, Inc. ("Gresham"). Gresham was originally named as a co-defendant in this action and it participated in the proceedings before the United States Court of Appeals for the Fourth Circuit. Upon motion of Celestine Garris, the Court of Appeals entered an order dismissing Gresham from the action, with prejudice, on May 1, 2000.

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STATEMENT OF THE CASE

In April of 1997, Christopher Garris ("Garris"), age 21, (the son of Respondent, Celestine Garris) was employed by Tidewater Temps, Inc. and was working for Mid-Atlantic Coatings ("Mid-Atlantic"), a company in the business of sandblasting and cleaning ships' hulls and holds. On the night of April 8, 1997, Christopher Garris was working on board the USNS MAJ. STEPHEN W. PLESS at Pier 11 at the Norfolk Shipbuilding & Drydock Corporation ("NORSHIPCO"), while the vessel was berthed in the navigable waters of the United States. On that night, Mid-Atlantic, was working pursuant to a contract with NORSHIPCO for repairs to the ship. At approximately 10:20 p.m., Garris was asked by his supervisor to climb to the top of a reserve sand hopper silo, a structure approximately thirty feet above the deck of the ship that held and funneled sand for use in sandblasting operations. The silo needed to be refilled with sand and a crane was used to raise a container full of sand up to the silo. Once atop the reserve silo, Garris was to throw a hand operated lever on the container that would allow the sand to flow out of the container and into the silo. As a result of a poor communication signaling system as directed by NORSHIPCO, and as a result of the negligence of a crane operator, Garris was knocked off the silo by the crane and he fell to his death on the deck of the ship.

Because Garris was engaged in maritime employment and was working on navigable waters, he was covered by the Longshore & Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, *et seq.* (LHWCA), and consequently, his parents received certain funeral expense benefits. While the LHWCA § 905(b) specifically provides for an employee's

cause of action against "a vessel", this is not such a case, but instead is an action against other contractors working aboard the USNS MAJ. STEPHEN W. PLESS. Garris has no statutory cause of action under the LHWCA against NORSHIPCO.

Celestine Garris brought suit in the United States District Court for the Eastern District of Virginia against NORSHIPCO and E.T. Gresham, Inc. ("Gresham") (whose employee was operating the crane) seeking recovery for the wrongful death of her son based upon negligence under general maritime law and the Virginia wrongful death statute, Va. Code § 8.01-50. The district court dismissed her suit on the ground that general maritime law does not recognize a negligence-based cause of action.[1]

The district court's dismissal of the wrongful death negligence action under general maritime law was based on its conclusion that *Moragne v. States Marine Lines*, 398 U.S. 375 (1970) did not create a general maritime cause of action for wrongful death based on negligence. The Fourth Circuit agreed, but nonetheless reversed the district court's dismissal after deciding to extend *Moragne* to recognize such a cause of action explaining that "[b]ecause the creation of a negligence-based wrongful death action is consistent with the principles of uniformity and consistency that formed the basis for *Moragne*, and because Congress has not

1. The district court dismissed with prejudice the general maritime law wrongful death claim. The district court did not exercise supplemental jurisdiction over the state wrongful death action and dismissed the state law claim without prejudice. Celestine Garris thereafter filed the state wrongful death action in Virginia state court only against Gresham. That action has since been dismissed by the state court on the ground that Gresham's crane operator was the "borrowed servant" of NORSHIPCO.

affirmatively precluded a negligence-based wrongful death claim, we find it appropriate to recognize a general maritime law cause of action for wrongful death based upon negligence." *Garris v. Norfolk Shipbuilding & Drydock Company, Inc.*, 210 F.3d 209 at 211 (4th Cir. 2000). In a concurring opinion a member of the panel agreed with the judgment but argued that *Moragne* need not be extended in order to create such a cause of action because "*Moragne* itself created a cause of action for negligence-based wrongful death." *Id.* at 223 (Hall, J., concurring).

REASONS FOR DENYING THE WRIT

A. The "Three-Way split" which the Petitioner claims exists in the Federal Courts of Appeal is, for practical purposes, at most a two-way split and may actually be no split at all

NORSHIPCO contends that certiorari should be granted in order to resolve a three-way split among the Federal Courts of Appeal as to whether *Moragne* created a general maritime cause of action for negligence-based wrongful death. NORSHIPCO argues that the Fifth and Eleventh Circuits (and the Virginia Supreme Court) have held that no such cause of action was created by *Moragne* and that *Moragne* only recognized a general maritime cause of action for wrongful death based on unseaworthiness. On the other hand, the Second and Fifth Circuits[2] (and the Texas Supreme

2. In *Ivy v. Security Barge Lines*, 606 F.2d 524, 527 (1979), the Fifth Circuit, sitting en banc, held that Moragne only created a general maritime cause of action for wrongful death based on unseaworthiness. The most recent decision from the Fifth Circuit on this issue is *Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d

(Cont'd)

Court[3]) have held that *Moragne* created a wrongful death cause of action premised on both negligence and unseaworthiness. The Fourth and Ninth Circuits have held that while *Moragne* only recognized a general maritime cause of action for wrongful death based on unseaworthiness, *Moragne* should be extended so as to recognize a negligence-based wrongful death action under general maritime law. Putting aside the Fifth Circuit for the moment, this "three-way split" is in reality at most a "two-way split" in that the Second, Fourth and Ninth Circuits (and the Texas Supreme Court) recognize a general maritime negligence-based cause of action for wrongful death and only the Eleventh Circuit (and the Virginia Supreme Court) do not. Whether the Second, Fourth and Ninth Circuits (and the Texas Supreme Court) arrive at their conclusion by extending *Moragne* or by simply applying *Moragne*, the result is the same.

Upon closer inspection, even the Eleventh Circuit's opinion does not support an argument that there is a true split among the Circuits. As the concurring opinion in *Garris* explained, in *Ford v. Wooten*, 681 F.2d 712, 716 (11th Cir. 1982), the Eleventh Circuit held that *Moragne* does not create a negligence-based wrongful death cause of action "where a cause of action exists for wrongful death under DOHSA [the Death on the High Seas Act]." In *Ford* the court held that "at least where statutory remedies exist, we deem consistency with the federal remedial schemes to be more important than the somewhat limited loss

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(Cont'd)
1084 (1993), *aff'd sub nom. Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), in which the court held, without reference to *Ivy*, that *Moragne* created a general maritime cause of action for wrongful death based on negligence.

3. *See General Chemical Corporation v. De La Lastra*, 852 S.W.2d 915 (Tex. S. Ct. 1993), *cert. dismissed*, 510 U.S. 985 (1993).

of uniformity." *Ford* at 716. Unlike the present case, in *Ford* DOHSA provided a statutory cause of action and remedies to the plaintiff.

Respondent does not agree that the Fifth Circuit's position on this issue is unsettled. The Fifth Circuit has most recently held that *Moragne* "recognized a wrongful death action for negligence and unseaworthiness under general maritime law." *See Miles v. Melrose*, 882 F.2d 976, 985 (1989), *aff'd sub nom. Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). This Court's opinion upholding the Fifth Circuit's decision in *Miles*, while not expressly addressing the above-quoted sentence in the Fifth Circuit's opinion, strongly supports the conclusion that the wrongful death action recognized in *Moragne* is not limited to liability premised on unseaworthiness.

First, liability in *Miles* was premised on both negligence and unseaworthiness. *Miles*, 882 F.2d at 980. Second, in *Miles*, this Court rejected a similar attempt to limit the reach of *Moragne*.[4] *Miles*, 498 U.S. at 27. Third, this Court's affirmance in *Miles* pointed to the unanimous enactment of state wrongful death statutes, The Jones Act and the The Death on the High Seas Act (all of which include negligence as a theory of liability) as having "established an unambiguous policy in abrogation of those principals that underlay *The Harrisburg* [which denied a general maritime wrongful death claim premised on negligence].[5] Such a policy is 'to be given its appropriate weight

4. In *Miles* the defendant, Apex, argued that *Moragne*'s holding, creating a general maritime wrongful death action, did not apply because the plaintiff, Torregeno, was a true seaman whereas *Moragne* was a longshoreman. This Court stated "Apex is correct that *Moragne* does not apply on its facts, but we decline to limit *Moragne* to its facts." *Miles*, 498 U.S. at 27.

5. *The Harrisburg*, 119 U.S. 199 (1886).

not only in matters of statutory construction but also in those of decisional law.' " *Miles*, 498 U.S. at 23-24 (quoting *Moragne* at 391). The *Miles* Court went on to say that "the unanimous legislative judgment behind the Jones Act, DOSHA, and the many state statutes created a strong presumption in favor of a general maritime wrongful death action." *Id.* at 24. This Court's opinion in *Miles* said nothing that would even hint that the general maritime wrongful death action recognized in *Moragne*, reaffirmed in *Miles*, and which embodied the "unanimous legislative judgment" of state and federal legislatures recognizing negligence-based wrongful death recoveries, was to be limited only to actions premised on the theory of unseaworthiness. *See also Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 214 n.11 (1996) ("While unseaworthiness was the doctrine immediately at stake in *Moragne*, the right of action, as stated in the Court's opinion, is for 'death caused by violation of maritime duties.' ").

Respondent contends that in light of *Miles* (and *Yamaha*), the decision in *Ivy v. Security Barge Lines, Inc.*, 606 F.2d 524 (5th Cir. 1979) is no longer good law even in the Fifth Circuit to the extent it can be read as restricting the wrongful death action to liability premised on unseaworthiness. Moreover, as the concurring opinion in *Garris* points out, the majority opinion in *Ivy* was premised on a concern that the plaintiff might obtain inconsistent double recoveries for the same injury under *Moragne* and the Jones Act. No such concern exists in this case as Garris has no wrongful death action available under the LHWCA and possibly no action under the Virginia wrongful death statute. Under *Yamaha*, apparently only "non-seafarers" are permitted the application of the state law of the waters in which the accident occurred. Justice Ginsberg stated:

> Traditionally, state remedies have been applied in accident cases of this order — maritime wrongful death cases in which no federal statute specifies the appropriate relief and the decedent was not a seaman, longshore worker, or person otherwise engaged in a maritime trade. We hold . . . that state remedies remain applicable in such cases and have not been displaced by the federal maritime wrongful death action recognized in *Moragne*.

Yamaha at 202. *See Ghotra v. Bandila Shipping, Inc.*, 113 F.3d 1050, 1058-60 (9th Cir. 1997) (finding that marine surveyor killed aboard a ship was a "seafarer" within the meaning of *Yamaha* and holding that therefore state wrongful death remedies were preempted by federal maritime law). *See also Goose Creek Trawlers, Inc., Limitation Proceedings F/V Haley Clark*, 1997 AMC 1546 (1997) (following *Yamaha*, state wrongful death statutes are available only when decedent was not a seaman, longshore worker, or person otherwise engaged in a maritime trade).

We are then left with Virginia state courts as the only jurisdiction which unambiguously limits *Moragne*'s general maritime action for wrongful death to the maritime duty of unseaworthiness. *See Brown v. Brown*, 309 S.E.2d 586 (1983), *cert. denied*, 467 U.S. 1242 (1984). As detailed above, the decisional landscape has changed dramatically in the seventeen years since *Brown* was decided. The *Brown* decision relied on the Fifth Circuit's decision in *Ivy* and the Eleventh Circuit's decision in *Ford v. Wooten*, 681 F.2d 712, 717 (11th Cir. 1982), *cert. denied*, 459 U.S. 1202 (1983). Both cases are of dubious continuing vitality in light of more recent contrary authority, including the Fifth Circuit's change

of position in *Miles* and this Court's decisions in *Miles* and *Yamaha*. Moreover, the *Brown* Court was apparently unaware of the Ninth Circuit's decision in *Nelson v. United States*, 639 F.2d 469, 473 (9th Cir. 1980). Respondent is confident that when the Virginia Supreme Court is presented with the question again, it will follow the overwhelming authority (most of which has been decided since *Brown* and which now includes the Fourth Circuit) which recognizes a general maritime wrongful death cause of action premised on negligence.

B. This Court has already determined the existence of a negligence-based wrongful death action under general maritime law

It is the position of respondent that this Court in *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996) has already answered in the affirmative the question of whether there is a general maritime negligence-based wrongful death action. In *Yamaha*, a twelve-year-old was killed in a jet ski accident at a beach in Puerto Rico. Her parents brought a negligence-based wrongful death action under state law against the jet ski manufacturer. The jet ski manufacturer argued that because the accident occurred on navigable waters, state remedies were displaced by the federal maritime wrongful death action recognized in *Moragne*. This Court disagreed holding that the federal maritime claim for wrongful death recognized in *Moragne* does not supply the exclusive remedy in cases involving the deaths of nonseafarers in territorial waters. Essential to the discussion and holding in *Yamaha* is the existence of a general negligence-based wrongful death action which might arguably displace state law remedies. If no such cause of action exists under general maritime law

as NORSHIPCO contends, then the *Yamaha* litigation and this Court's opinion were much ado about nothing. In effect, NORSHIPCO argues that *Yamaha* stands for nothing because the federal claim that the Court found did not preempt state law remedies does not exist to begin with.

No court or commentator writing after the *Yamaha* opinion was handed down has agreed with NORSHIPCO's argument. *See* Steven F. Friedell, Searching for a Compass: Federal and State Law Making Authority in Admiralty, 57 La. L. Rev. 825, 835 (1997) ("[T]he holding in *Moragne* was not limited to unseaworthiness. The Court held that 'an action does lie under general maritime law for death caused by violation of maritime duties.' As recognized by the *Yamaha* Court, this encompasses not only unseaworthiness but also products liability and negligence."). In fact, as pointed out in the concurring opinion in *Garris*, the *Yamaha* Court cited with approval Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* at 368 (2d ed. 1974) where the authors concluded that the *Moragne* remedy "provides recovery for deaths caused by negligence as well as for deaths caused by unseaworthiness."

C. Petitioner's remaining arguments based on federalism and separation of powers are unpersuasive

NORSHIPCO argues that important issues of federalism and separation of powers are implicated in its appeal. With regard to the issue of federalism, NORSHIPCO contends that recognition of a negligence-based general maritime wrongful death action will somehow undermine state wrongful death statutes.[6] Just the opposite is true. *Moragne* sought to give effect

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6. NORSHIPCO's federalism concerns and arguments concerning uniformity (Petition for Writ at pp. 12-14) assume (Cont'd)

to the policies underlying the enactment of state wrongful death actions. In *Miles*, this Court recognized this goal of *Moragne* when it stated "the unanimous legislative judgment behind the Jones Act, DOSHA, and the many state statutes created a strong presumption in favor of a general maritime wrongful death statute." *Miles* at 24.

Due to principles of uniformity and consistency necessary to the administration of federal maritime law, some minor inconsistencies will no doubt exist concerning the specifics of state wrongful death statutes and a general maritime wrongful death action. However, the overriding state policy of permitting a negligence-based cause of action for wrongful death is promoted by recognizing a general maritime negligence-based cause of action for wrongful death. If a general maritime cause of action for wrongful death is not available under the facts of this case, the clear and longstanding public policy of Virginia will be thwarted because the state wrongful death statute may not be available to Garris in the wake of *Yamaha*.

Petitioner's dire warnings concerning "separation of powers" also do not hold up upon inspection. There is nothing in the LHWCA which purports to limit a longshoreman or

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(Cont'd)

Virginia's wrongful death statute is or was available to Respondent. However, NORSHIPCO's counsel successfully argued in *Goose Creek Trawlers, Inc., Limitation Proceedings F/V Haley Clark*, 1997 AMC 1546 (1997) that, following *Yamaha*, state wrongful death statutes are only available to nonseafarers who are killed in navigable waters. It appears clear that Garris is a "seafarer" as defined by *Yamaha* as he was "a person otherwise engaged in maritime trade" and he was covered by the LHWCA. *See Yamaha*, 516 U.S. at 201 and 205 n.2.

harbor worker's rights against anyone except his employer and the vessel owner.[7] If, as NORSHIPCO suggests, such a limit was intended by Congress it certainly would have included it in the statute. "The LHWCA does not require a claimant to elect between statutory compensation and tort recovery. She can both accept compensation and file a civil action against a third party tortfeasor." Thomas J. Schoenbaum, *Admiralty and Maritime Law*, 2nd ed., Vol. 1 at 434. Petitioner's separation of powers argument is a frontal attack on *Moragne,* for even under NORSHIPCO's stingy reading of the case, *Moragne* was filling legislative gaps by judicial decision-making. *Moragne* at 391.

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7. When the LHWCA was passed in 1927, it created a no-fault compensation scheme for longshoreman and harbor workers and their employers. It also codified a cause of action for negligence by such workers against vessel owners. *See* 33 U.S.C. § 905(b). Later, in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), the Supreme Court extended the warranty of seaworthiness to longshoreman who were aboard a ship doing seaman's work. Then, in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956) the Supreme Court found an implied warranty of workmanlike performance running from the stevedore to the vessel owner. This set off a "liability 'round robin' whereby an injured longshoreman could recover damages for unseaworthiness from the shipowner who in turn could recover against the longshoreman for breach of the implied warranty of workmanlike performance." Thomas J. Schoenbaum, *Admiralty and Maritime Law*, 2nd ed., Vol. 1 at 434. The 1972 amendments to the LHWCA sought to eliminate this problem by abolishing the *Sieracki* cause of action for unseaworthiness against vessel owners and the indemnity action created by *Ryan* in favor of vessel owners. The 1972 amendments did not address the liability of non-vessel third parties because they were not part of the problem Congress sought to correct.

CONCLUSION

Based on the clear weight of recent authority recognizing a general maritime cause of action for negligence-based wrongful death arising out of *Moragne*, including this Court's opinion in *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996), respondent believes that the issue requires no further clarification at this time. It is respectfully suggested that until such time as a lower court decision is handed down which ignores this recent precedent and holds that the *Moragne* cause of action is limited to unseaworthiness, there is no need to clarify the issue because there is no split among the circuits or confusion to clarify.

Respectfully submitted,

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(3)

Supreme Court
FILE
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CLERK

No. 00-346

IN THE

SUPREME COURT OF THE UNITED STATES

NORFOLK SHIPBUILDING
& DRYDOCK CORPORATION

Petitioner,

v.

CELESTINE GARRIS, ADMINISTRATRIX OF THE ESTATE
OF CHRISTOPHER GARRIS, DECEASED

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. PRELIMINARY STATEMENT

This Court should grant a writ of *certiorari* in this case to resolve a tripartite split in the federal courts of appeal and state supreme courts over the scope of the remedy created by the short-lived but often cited Moragne v. States Marine Lines, 398 U.S. 375 (1970). Celestine Garris's ("Garris") Brief in Opposition attempts, but fails, to explain why this issue does not merit this Court's attention. The new (and surprising) argument asserted by Garris is that Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199 (1996), resolved the question presented in this case. To the contrary, Yamaha merely reserved this question for another day. Petitioner respectfully submits that that day has come.

II. ARGUMENT

In her Brief in Opposition, Garris asks the Court to ignore the discordant judicial interpretations regarding the remedy created in Moragne. She argues that Yamaha "determined the existence of a negligence-based wrongful death action under general admiralty law." Brief in Opposition at 8. Garris confidently asserts — in her *second* argument section — that Yamaha "answered in the affirmative the question of whether there is a general maritime negligence-based wrongful death action." Brief in Opposition at 8.[1]

---

[1] Likewise, as a result of Yamaha (and the more recent federal court authorities), Garris "is confident that when the Virginia Supreme Court is presented with the question again, it will" overrule Brown v. Brown, 309 S.E.2d 586 (Va. 1983), cert. denied, 467 U.S. 1242 (1984), and "follow the overwhelming authority . . . which recognizes a general maritime wrongful death cause of action premised on negligence." Brief in Opposition at 8. Garris's own actions belie

(continued . . .)

Garris's argument overlooks plain language in the Yamaha opinion reserving the question of what remedies Moragne created. In its opinion in this case, the Fourth Circuit noted this plain language: "[W]e note that the [Supreme] Court in footnote seven [of Yamaha] expressly refrained from addressing this question . . . ." App. 15. The Eastern District of Virginia's opinion in this case similarly concludes: "A thorough analysis of Yamaha reveals that in Yamaha, the Supreme Court reserved the issue of whether a wrongful death action sounding in negligence exists under general maritime law." App. 50. As Yamaha succinctly stated: "The question we confront is not what Moragne added to the remedial arsenal in maritime cases, but what, if anything, it removed from admiralty's stock." Yamaha, 516 U.S. at 210 n.7; see App. 15. Thus, notwithstanding Garris's unsupported arguments to the contrary, this Court did not address in Yamaha whether Moragne created a wrongful death cause of action sounding in negligence.

Championing the Yamaha opinion even further, Garris boldly pronounces, "[n]o court or commentator writing after the Yamaha opinion was handed down has agreed with NORSHIPCO's argument." Brief in Opposition at 9. Garris's statement overlooks the fact that the Eastern District of Virginia agreed with NORSHIPCO and held that Garris had no negligence-based general maritime law claim to plead in this case. See App. 44, 48-50. The

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her purported confidence. Garris originally filed her wrongful death claim in Virginia state court but nonsuited the case and refiled in federal court rather than confront the Brown decision in state court. Furthermore, Garris's legal counsel lost this exact issue in a lower state court case in 1997, yet declined to appeal the case to the Supreme Court of Virginia to seek a reversal of Brown. See Johnson v. Walsh, 41 Va. Cir. 314 (Va. Beach Cir. Ct. 1997).

Fourth Circuit then considered NORSHIPCO's argument and "agree[d] with the district court and conclude[d] that Moragne did not recognize a general maritime law cause of action for wrongful death based upon negligence." App. 19.

While the Fourth Circuit held that Moragne did not create a negligence-based remedy, it went on to create one. This decision implicates significant policy considerations. First, the opinion exacerbates rather than resolves the already existing split in authorities on the proper interpretation of Moragne. Compare Ford v. Wooten, 681 F.2d 712, 714 (11th Cir. 1982), cert. denied, 459 U.S. 1202 (1983); Ivy v. Security Barge Lines, Inc., 606 F.2d 524, 527 (5th Cir. 1979), cert. denied, 446 U.S. 956 (1980); Brown v. Brown, 309 S.E.2d 586, 590 (Va. 1983), cert. denied, 467 U.S. 1242 (1984), with Wahlstrom v. Kawasaki Heavy Industries, Ltd., 4 F.3d 1084, 1088 (2d Cir. 1993), cert. denied, 510 U.S. 1114 (1994); Miles v. Melrose, 882 F.2d 976, 985 (5th Cir. 1989), aff'd sub. nom. on other grounds, Miles v. Apex Marine Corp., 498 U.S. 19 (1990); Nelson v. United States, 639 F.2d 469, 473 (9th Cir. 1980); General Chemical Corp. v. De La Lastra, 852 S.W.2d 916, 919 (Tex.), cert. dismissed, 510 U.S. 985 (1993). Without guidance from this Court, the lower federal courts and state supreme courts will continue to struggle over the true meaning of the remaining vestiges of Moragne.[2]

---

[2] The holding of Moragne was short-lived. Congress overruled Moragne by statute when it passed the 1972 amendments to the Longshore and Harbor Workers' Compensation Act. E.g., App. 42 (Widener J., dissenting opinion); see Miles v. Apex Marine Corp., 498 U.S. 19, 28 (1990). The question here is whether there is enough left of Moragne to extend it to create yet another judge-made remedy.

Second, because it creates a new cause of action for deaths in state territorial waters, the Fourth Circuit's opinion raises the question of the proper balance between uniformity and federalism in maritime law. The need — or lack of a need — for uniformity has frequently been debated in case law and commentary. See Yamaha, 516 U.S. at 210 n.8; American Dredging Co. v. Miller, 510 U.S. 443, 450-51 (1994); Robert Force, Post-Calhoun Remedies for Death and Injury in Maritime Cases: Uniformity, Whither Goest Thou?, 21 Tul. Mar. L.J. 7 (1996); Robert D. Peltz, The Myth of Uniformity in Maritime Law, 21 Tul. Mar. L.J. 103 (1996). The lower federal courts currently operate without clear guidance on the interplay of uniformity and federalism in state territorial waters.

Last, the Fourth Circuit's opinion implicates separation of powers concerns. On more than one occasion in the last 10 years, this Court has cautioned against adding general maritime law remedy and recovery schemes in areas both where Congress has legislated and where Congress has had the opportunity to legislate but declined to do so. See Dooley v. Korean Air Lines Co., Ltd., 524 U.S. 116, 122-24 (1998); Miles v. Apex Marine Corp., 498 U.S. 19, 36-37 (1990). In his dissenting opinion to the Fourth Circuit's decision not to rehear this case *en banc*, Judge Widener highlighted one of many separation of powers concerns — the conflict between the Fourth Circuit's new remedy and "explicit" Congressional intent found in the Longshore and Harbor Workers' Compensation Act. App. 41-43. This Court should accept this case and provide guidance on the proper extension of judge-made remedies into legislated areas of maritime law.

III. CONCLUSION

Garris's Brief in Opposition falls far short of explaining that this case does not deserve a writ of *certiorari*. Garris merely argues that Yamaha answered all of Moragne's unanswered questions. This argument is absolutely refuted by footnote 7 in Yamaha. In footnote 7, this Court stated that it did not determine "what Moragne added to the remedial arsenal in maritime case . . . ." Yamaha, 516 U.S. at 210 n.7. The Court should grant a writ of *certiorari* in this case and explain what Moragne added to the remedial arsenal in maritime cases. Thirty years has been long enough to leave this question unanswered.

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November 7, 2000

No. 00-346

(5)

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION,

Petitioner,

v.

CELESTINE GARRIS, Administratrix of the ESTATE OF CHRISTOPHER GARRIS, Deceased,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 30, 2000
CERTIORARI GRANTED DECEMBER 11, 2000

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APPENDIX A — RELEVANT DOCKET ENTRIES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION

2:98cv382		Garris v. Norfolk Shipbuilding, et al
4/9/98	1	COMPLAINT; Filing Fee $150.00 paid by Kaufman & Canoles; Receipt #200-16791 (mwin) [Entry date 04/13/98]
5/4/98	4	MOTION by E. T. Gresham, Inc. to Dismiss for failure to state a claim (mwin) [Entry date 05/06/98]
5/4/98	5	MEMORANDUM by E. T. Gresham, Inc. in support of [4-1] motion by E. T. Gresham, Inc. to Dismiss for failure to state a claim, received (mwin) [Entry date 05/06/98]
5/5/98	6	MOTION by Norfolk Shipbuilding to Dismiss for failure to state a claim (mwin) [Entry date 05/06/98]
5/5/98	7	MEMORANDUM by Norfolk Shipbuilding in support of [6-1] motion by Norfolk Shipbuilding to Dismiss for failure to state a claim, received (mwin) [Entry date 05/22/98]
5/18/98	8	MEMORANDUM by Celestine Garris in opposition to [6-1] motion by Norfolk Shipbuilding to Dismiss for failure to state a claim and [4-1] motion by E. T. Gresham, Inc. to Dismiss for failure to state a claim, received (mwin) [Entry date 05/22/98]

Appendix A

5/26/98	10	REPLY Brief by Norfolk Shipbuilding to response to [6-1] motion by Norfolk Shipbuilding to Dismiss for failure to state a claim, received (mwin) [Entry date 06/02/98]
5/26/98	—	Motion hearing re: [6-1] motion by Norfolk Shipbuilding to Dismiss for failure to state a claim set at 11:00 6/19/98, [4-1] motion by E. T. Gresham, Inc. to Dismiss for failure to state a claim set at 11:00 6/19/98 (mwin) [Entry date 06/02/98]
5/28/98	11	NOTICE of hearing by E. T. Gresham, Inc. (mwin) [Entry date 06/02/98] [Edit date 06/02/98]
6/1/98	12	NOTICE of hearing by Norfolk Shipbuilding (mwin) [Entry date 06/02/98]
6/19/98	—	Motion hearing held re: [6-1] motion by Norfolk Shipbuilding to Dismiss for failure to state a claim by Norfolk Shipbuilding, [4-1] motion by E. T. Gresham, Inc. to Dismiss for failure to state a claim by E. T. Gresham, Inc. (rlam)
6/19/98	13	Minute entry: COURT PROCEEDINGS — JBF,j. Sue Ash, Reporter. Counsel and plaintiff appeared. Matter came on defendants' motions to dismiss. Argument of counsel heard. Court ruled from the bench DISMISSING the federal claims with

prejudice and DISMISSING the state claims without prejudice to file in state court. Court to prepare an order. Court noted the appeal time to run from date of written opinion and order. Court adjourned. (rlam)

8/31/98 14 OPINION AND FINAL ORDER granting [6-1] motion by Norfolk Shipbuilding to Dismiss; granting [4-1] motion by E. T. Gresham, Inc. to Dismiss; Dismissing plaintiff's claims under general maritime law with prejudice; declining to exercise supplemental jurisdiction over plaintiff's pendant state law claims, and Dismissing same without prejudice; entered and filed 8/31/98 (signed by Judge Jerome B. Friedman) Copies Mailed: 8/31/98 (mwin)

8/31/98 15 JUDGMENT granting defendants' motions to dismiss, and dismissing plaintiff's claims under general maritime law with prejudice; declining to exercise supplemental jurisdiction over plaintiff's pendant state law claims, and dismissing same without prejudice; entered by clerk and filed 8/31/98. Copies Mailed: 8/31/98. ob (mwin)

9/11/98 16 NOTICE OF APPEAL OF [15-1] judgment order, [14-1] order Dismissing plaintiff's claims under general maritime law with prejudice by Celestine Garris. FILING FEE $ 105.00 RECEIPT # 18307 (forb) [Entry date 09/15/98]

Appendix A

9/15/98 — Copy of Notice of Appeal, Judgment, Opinion and Final Order and docket sheet to USCA: copy of notice of appeal and docketing statement to counsel for plaintiff; copy of notice of appeal to counsel [16-1] appeal by Celestine Garris (forb)

APPENDIX B — RELEVANT DOCKET ENTRIES OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

98-2368 Garris v. Norfolk Shipbuilding, et al

9/17/98	Civil case docketed. (sn)
10/1/98	Certification of ROA complete and retained in the District Court. [98-2368] (sn)
3/4/99	Certification transcript filed in district court by Sue Ash on 3/2/99. [98-2368] (sn)
3/17/99	Certification of ROA complete and retained in the District Court. [98-2368] (sn)
4/13/99	Brief joint appendix filed by Appellant Celestine Garris. Type of Service: HD Copies of brief: 8 # brf pages: 20 Copies of apx: 6 # apx pages: 56 Sufficient?[Y/N]: y 2-sided copying: y [98-2368] Appellee brief due 5/13/99 for E T Gresham Inc, for Norfolk Shipbuilding. (rhs)
5/17/99	Brief filed by Appellee Norfolk Shipbuilding, Appellee E T Gresham Inc. Type of Service: PM Copies: 8 # brf pages: 31. Sufficient [Y/N]: y. [98-2368] (rhs)
12/2/99	Oral argument heard. Courtroom Deputy: JLC, Jr. [98-2368] (jc)
4/3/00	Published, authored opinion filed. [98-2368] (amy)

Appendix B

4/3/00 Judgment order filed. Decision: reversed and remanded. EOD Date: 4/3/00. [98-2368] (amy)

4/17/00 Petition filed by Appellee Norfolk Shipbuilding, Appellee E T Gresham Inc for rehearing. Number copies filed: 20 [3171077-1]., for rehearing en banc. [3171077-2] [98-2368] (sn)

4/20/00 Motion filed by Appellee E T Gresham Inc to dismiss Appellee E T Gresham Inc as party to the appeal [3171831-1]. [98-2368] (sn)

4/24/00 Letter referencing motion to dismiss party [3171831-1] and a copy of the order dated 7/13/99 in the Circuit Court for the City of Norfolk (filed by Appellee E T Gresham Inc) [3173318-1] [98-2368] (amy)

4/24/00 Response/answer requested to motion for rehearing [3171077-1], motion for rehearing en banc [3171077-2] [98-2368] (amy)

5/1/00 COURT ORDER filed granting motion to dismiss party [3171831-1] Copies to all counsel. [98-2368] (amy)

5/4/00 Response/answer filed [3179796-1] by Appellant Celestine Garris to motion for rehearing [3171077-1], motion for rehearing en banc [3171077-2] [98-2368] (sn)

6/1/00 COURT ORDER filed denying motion for rehearing [3171077-1] EOD Date: 6/1/00,

	denying motion for rehearing en banc [3171077-2] EOD Date: 6/1/00. Copies to all counsel. [98-2368] (sn)
6/2/00	Corrected order filed per HEW's directions. Order is dissent from order of 6/1/00 disposing of motion for rehearing [3171077-1], motion for rehearing en banc [3171077-2]. [98-2368] (sn)
6/9/00	Mandate issued. [98-2368] (sn)
7/6/00	Motion filed by Appellee Norfolk Shipbuilding to recall the mandate file a petition for writ of certiorari [3214711-1]. [3214711-1], to stay the mandate [3214711-2]. [98-2368] (dad)
7/10/00	COURT ORDER filed granting motion to recall the mandate [3214711-1], granting motion to stay mandate [3214711-2] pending petition for a writ of certiorari. Copies to all counsel. [98-2368] (amy)
9/8/00	Supreme Court notice that petition for certiorari was filed on 08/30/00. Spct No.: 00-346 Spct Pty 1: Norfolk Shipbuilding & Drydock Corporation Spct Pty 2: Celestine Garris. [98-2368] (jh)
10/26/00	Federal Reporter Citation: 210 F.3d 209. [98-2368] (vsl)
12/18/00	Supreme Court order received granting petition certiorari [3249473-1] on 12/11/00. [98-2368] (dhb)

APPENDIX C — COMPLAINT DATED AND FILED APRIL 9, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

CIVIL ACTION NO. 2:98-CV-382

CELESTINE GARRIS, Administratrix of the ESTATE OF CHRISTOPHER GARRIS, deceased,

Plaintiff,

v.

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION,

SERVE: John L. Roper, IV
Registered Agent
750 Berkley Avenue
Norfolk, Virginia 23523

and

E. T. GRESHAM, INC.,

SERVE: Earl T. Gresham
Registered Agent
1038 West 26th Street
Norfolk, Virginia 23517

Defendants.

Appendix C

COMPLAINT

NOW COMES the plaintiff, Celestine Garris, Administratrix of the Estate of Christopher Garris, deceased, by counsel, and for her Complaint, states as follows:

1. This is a maritime and admiralty action within the meaning of Rule 9(h) and 28 U.S.C. § 1333.

2. The plaintiff is the mother of, and Administratrix of the Estate of Christopher Garris, deceased, who sustained fatal injuries on April 8, 1997, while working aboard the USNS MAJ. STEPHEN W. PLESS, while the vessel was berthed at Norfolk Shipbuilding & Drydock Corporation ("NORSHIPCO"), Norfolk, Virginia, in the navigable waters of the United States of America.

3. The plaintiff believes that the plaintiff's deceased was employed by Tidewater Temps, Inc. ("Tidewater") to perform sand blasting work for Mid-Atlantic Coatings, Inc. ("Mid-Atlantic"), a sub-contractor of NORSHIPCO.

4. The defendant, NORSHIPCO, is a ship repair company who had contracted to perform certain work on the USNS MAJ. STEPHEN W. PLESS.

5. The defendant, E. T. Gresham, Inc. ("Gresham"), was a subcontractor of either Mid-Atlantic or NORSHIPCO, and had responsibilities with regard to the provision of and/or operation of a crane alongside the USNS MAJ. STEPHEN W. PLESS.

Appendix C

6. On April 8, 1997, while working aboard the USNS MAJ. STEPHEN W. PLESS, the plaintiff's deceased sustained injuries and died on April 9, 1997, as a result of the negligence of the defendants, jointly and severally.

7. The plaintiff demands damages pursuant to the general maritime law for funeral expenses, pain and suffering of the decedent prior to his death, loss of society and loss of services, and for damages pursuant to the Virginia Wrongful Death Act, § 8.01-52.

WHEREFORE, the plaintiff prays for judgment against the defendants, jointly and severally, in the amount of Two Million and 00/100 Dollars ($2,000,000.00).

CELESTINE GARRIS, Administratrix
of the ESTATE OF CHRISTOPHER
GARRIS, deceased

By s/ John R. Crumpler, Jr.
Of Counsel

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APPENDIX D — NORSHIPCO'S MOTION TO DISMISS DATED AND FILED MAY 6, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

CIVIL ACTION NO. 2:98-CV-382

CELESTINE GARRIS, Administratrix of the ESTATE OF CHRISTOPHER GARRIS, deceased,

Plaintiff,

v.

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION, et al.,

Defendants.

NORSHIPCO'S MOTION TO DISMISS

Defendant, Norfolk Shipbuilding & Drydock Corporation ("NORSHIPCO"), by counsel, hereby moves to dismiss the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the grounds that plaintiff has failed to state a claim against it for which relief may be granted. In support of this motion, NORSHIPCO adopts the arguments and authority contained in the brief which is filed in support of this motion.

Appendix D

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION

By: s/ Robert M. Tata
Of Counsel

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APPENDIX E — OPINION AND FINAL ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION DATED AND FILED AUGUST 31, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Civil Action No. 2:98-cv-382

CELESTINE GARRIS, Administratrix of the ESTATE OF CHRISTOPHER GARRIS, deceased,

Plaintiff,

v.

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION,

and

E.T. GRESHAM, INC.,

Defendants.

OPINION AND FINAL ORDER

This matter comes before the Court on Defendants' Motions to Dismiss for Failure to State a Claim. For the reasons stated below, the Court finds that no cause of action exists, under general maritime law, for death of a nonseaman in state territorial waters resulting from negligence.

Appendix E

Defendants' motions to dismiss are GRANTED, and Plaintiff's federal claims are DISMISSED with prejudice. The Court declines to exercise supplemental jurisdiction under Title 28, United States Code Sections 1367(a) and (c)(3) over Plaintiff's Virginia Wrongful Death Act claim; the state claim is therefore DISMISSED without prejudice.

I. Factual Background

Celestine Garris, as Administratrix of the Estate of Christopher Garris, seeks damages relating to the death of Christopher Garris. Plaintiff's claims are brought under both general maritime law and the Virginia Wrongful Death Act. While the parties do not agree on the actual series of events which led to the death of Christopher Garris, those factual discrepancies need not be resolved for purposes of ruling on Defendants' motions.

According to the Plaintiff, on April 8, 1997, the decedent was performing sandblasting work on the USNS MAJOR STEPHEN W. PLESS for Mid-Atlantic Coatings, Inc. ("Mid-Atlantic") through a temporary agency. Norfolk Shipbuilding & Drydock Company ("NORSHIPCO"), a ship repair company who had contracted to perform work on the vessel, sub-contracted the sandblasting work to Mid-Atlantic. To accomplish the sand-blasting, a pre-loaded hopper of sandblast shot was lifted from the pier to the opening of a silo located on the deck of the vessel. A door on the underside of the hopper was then opened to release the shot, depositing the shot in the opening of the silo. The particular silo in question was approximately 30 feet in height. Christopher Garris fell from the top of the silo onto the deck of the vessel,

sustaining fatal injuries in the fall. Garris passed away on April 9, 1997.[1] The USNS MAJOR STEPHEN W. PLESS was docked in Norfolk, Virginia, in the navigable waters of the United States of America at the time of the incident.

Plaintiff seeks damages under general maritime law for funeral expenses, pain and suffering of the decedent, loss of society, and loss of services. In a pendant state claim, Plaintiff seeks damages pursuant to the Virginia Wrongful Death Act.

II. Analysis

A. Standard of Review

In a Motion to Dismiss, the complaint is construed in the light most favorable to the plaintiff, and the plaintiff's allegations are taken as true. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Jenkins v. McKeither*, 395 U.S. 411, 421 (1969). Nonetheless, the Fourth Circuit has held that "[c]onclusory allegations regarding the legal effect of the facts alleged" need not be accepted as true. *Labram v. Havel*, 43 F.3d 918, 921 (4th Cir.1995). In order for the Court to grant a motion to dismiss, it must appear to a certainty that

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1. The Plaintiff received death benefits under the Longshore and Harbor Workers' Compensation Act, and filed suit in state court seeking additional recovery. Under Virginia law, no general maritime cause of action exists for negligence for the death of a nonseaman in state territorial waters. *See, e.g., Brown v. Brown*, 226 Va. 320, 327, 309 S.E.2d 586, 590 (1983). Plaintiff nonsuited the state court action following the filing of a demurrer and miscellaneous other motions by Defendants. The instant action was filed shortly thereafter.

the plaintiff cannot prove *any* facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Martin Marietta Corp. v. International Telecommunications Satellite Org.*, 991 F.2d 94, 97 (4th Cir. 1993).

B. Negligence Action Under General Maritime Law

The sole issue before this Court is whether Plaintiff may properly maintain a negligence action under general maritime law. The Supreme Court first recognized a general maritime law cause of action for death occurring from a breach of maritime duties in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). Plaintiff argues that in the *Moragne* decision, the Supreme Court intended to establish the propriety of both unseaworthiness and negligence claims under general maritime law. Defendants submit that the Supreme Court's recognition in *Moragne* was limited to unseaworthiness claims, and that general maritime law has not been extended to include a negligence cause of action for the wrongful death of a nonseaman in state territorial waters. *See Ford v. Wooten*, 681 F.2d 712, 715 (11th Cir.1982) (Hoffman, District Judge sitting by designation) (recognizing *Moragne* "pertained only to an unseaworthiness claim"); *Minnick v. United States*, 767 F.Supp. 115, 118-119 (E.D. Va.1990) (noting "*Moragne* created a general maritime wrongful death cause of action for unseaworthiness").

The *Moragne* decision was a necessary reaction to an antiquated common law holding. In rendering the decision it did, the Supreme Court filled an obvious void that materialized following the enactment of the Death on the High Seas Act and the Jones Act. Prior to *Moragne*,

no federal cause of action existed for wrongful death in state territorial waters due to unseaworthiness. The Supreme Court has never applied its holding in *Moragne* to negligence claims, although some jurisdictions have expanded the decision to allow negligence actions under general maritime law, or otherwise held the decision intended to provide a general maritime law action for both unseaworthiness and negligence. *See, e.g., Nelson v. United States*, 639 F.2d 469, 473 (9th Cir. 1980) (holding the need for uniformity requires extension of Moragne to negligence claims); *Miles v. Melrose*, 882 F.2d 976 (5th Cir. 1989) (noting, without citation, that *Moragne* recognized actions for both unseaworthiness and negligence.); *Neil v. McGinnis*, 716 F.Supp. 996 (E.D. Ky. 1989); *Garner v. Dravo Basic Materials*, 768 F.Supp. 192 (S.D. W.Va. 1991); *Cantore v. Blue Lagoon Water Sports, Inc.*, 799 F.Supp. 1151 (S.D. Fla. 1992); *but see generally Ivy v. Security Barge Lines, Inc.*, 606 F.2d 524 (5th Cir. 1979).

The 1972 amendments to the Longshore and Harbor Workers' Compensation Act superseded the holding in *Moragne*, foreclosing a general maritime law wrongful death action by the survivors of a longshoreman or harbor worker. *See* 33 U.S.C. §§ 901-950; *Miles v. Apex Marine*, 498 U.S. 19, 28 (1990). Defendants submit that this responsive legislative action cautions against the extension of *Moragne* beyond unseaworthiness, an argument with which the Court is inclined to agree. The Court, however, must also take into consideration the Supreme Court's more recent decision in *Yamaha Motor Corporation v. Calhoun*, 516 U.S. 199 (1996), as well as decisions previously rendered by other judges of this district.

Appendix E

In *Minnick v. United States*, *supra*, the parties assumed a negligence action could be pursued under general maritime law. Judge Clarke, in reviewing *Moragne* and the cases interpreting *Moragne*, found the assumption to be incorrect, noting that *Moragne* created only a general maritime wrongful death cause of action for unseaworthiness. *Minnick*, 767 F.Supp. at 117-18.[2] Similarly, Judge Hoffman, sitting on the Eleventh Circuit by designation, considered "whether *Moragne* should be extended to permit recovery under general maritime law for wrongful death caused by negligence." *Ford*, 681 F.2d at 716. Judge Hoffman, writing for a panel of the Eleventh Circuit, held that *Moragne* pertained only to unseaworthiness claims, and that subsequent Supreme Court decisions supported this finding. *Id.* at 715. Although the decisions in *Minnick* and *Ford* predated the Supreme Court's opinion in *Yamaha*, the Court finds the reasoning of Judges Hoffman and Clarke in those decisions remains sound.

Yamaha held the general maritime wrongful death action recognized in *Moragne* did not preempt state remedies for non-seaman deaths in territorial waters. *Id.* at 215. In rendering this decision, the Supreme Court created some confusion regarding the current status of the law. The Court noted in footnote seven, that:

> If *Moragne's* wrongful death action did not extend to non-seafarers like Natalie [injured in a jet ski accident], one could hardly argue that *Moragne*

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2. Judge Clarke further found that the plaintiff in *Minnick* could pursue a negligence action under LHWCA, allowing the plaintiff leave to amend to assert the appropriate claim. *Minnick*, at 117-18.

> displaced the state law remedies the Calhouns seek. Lower courts have held that *Moragne's* wrongful death action extends to non-seafarers. (Citations omitted). *We assume, for purposes of this decision,* the correctness of that position. Similarly, as in prior encounters, we assume *without deciding* that *Moragne* also provides a survival action. [Citation omitted.] The question we confront is not what *Moragne* added to the remedial arsenal in maritime cases, but what, if anything, it removed from admiralty's stock. [Emphasis added.]

Yamaha, 516 U.S. at 209, n. 7. Plaintiff also relies on footnote eleven in an attempt to persuade the Court that *Moragne* recognized negligence claims under general maritime law in addition to unseaworthiness claims. In footnote eleven, *Yamaha* correctly notes that the right of action, as stated in *Moragne*, established a cause of action "for death caused by violations of maritime duties." *Id.* at 214, n. 11. Nonetheless, unseaworthiness was the doctrine at stake before the Court in *Moragne*, not negligence. A thorough analysis of *Yamaha* reveals that in *Yamaha*, the Supreme Court reserved the issue of whether a wrongful death action sounding in negligence exists under general maritime law.[3]

The generality with which the Court spoke in *Moragne* is not sufficient to establish a general maritime law cause of

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3. Defendants also offer authority from the Virginia Supreme Court, in which the Court recognized that claims under general maritime law were restricted to claims of unseaworthiness. *See Brown v. Brown*, 226 Va. 320 (1983).

action for negligence in light of *Yamaha's* reservation of the issue, and the absence of any Supreme Court decision applying *Moragne* to negligence. Neither the arguments nor the case law set forth by Plaintiff are persuasive in her attempt to have this Court extend the application of general maritime law to negligence actions.

III. Conclusion

Accordingly, Defendants' Motions to Dismiss are **GRANTED** and Plaintiff's claims under general maritime law are **DISMISSED** with prejudice. The Court declines to exercise supplemental jurisdiction over Plaintiff's pendant state law claims, and the same are **DISMISSED** without prejudice.

The Clerk is **REQUESTED** to send a copy of this Opinion and Order to counsel for the Plaintiff and counsel for the Defendant.

It is so **ORDERED**.

s/ Jerome B. Friedman
UNITED STATES DISTRICT JUDGE

August 31, 1998

Norfolk, Virginia

APPENDIX F — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED AND DECIDED APRIL 3, 2000

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 98-2368

CELESTINE GARRIS, Administratrix of the Estate of Christopher Garris, deceased,

Plaintiff-Appellant,

v.

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION; E.T. GRESHAM, INCORPORATED,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk.
Jerome B. Friedman, District Judge.
(CA-98-382-2)

Argued: December 2, 1999

Decided: April 3, 2000

Before MURNAGHAN and WILLIAMS, Circuit Judges, and Cynthia Holcomb HALL, Senior Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

* * *

Appendix F

OPINION

WILLIAMS, Circuit Judge:

The sole issue on appeal is whether we should construe or extend the United States Supreme Court's decision in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), which recognized a general maritime law cause of action for wrongful death based upon unseaworthiness, to include a general maritime law cause of action for wrongful death based upon negligence. We agree with the district court that the Supreme Court did not create a general maritime law cause of action for wrongful death based upon negligence in *Moragne*. We find it appropriate, however, to apply the principles of *Moragne* and its progeny to recognize one. We, therefore, reverse the district court's dismissal of Celestine Garris's claim and remand for further proceedings.

I.

Christopher Garris (Garris's son) worked as a sandblaster aboard the USNS MAJ. STEPHEN W. PLESS, a ship berthed in the navigable waters of the United States. He was actually employed by Tidewater Temps but worked on behalf of Mid-Atlantic Coatings (Mid-Atlantic), a subcontractor of Norfolk Shipbuilding & Drydock Corporation (Norfolk). E.T. Gresham, Inc. (Gresham), another subcontractor for Norfolk, had employees aboard the same ship. On April 8, 1997, a crane operator working for Gresham accidentally caused Garris's son to fall off a reserve hopper on the ship, which was used to load sand for sandblasting. Garris's son died as a result of the accident.

Appendix F

After receiving statutory death benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C.A. §§ 901-950 (West 1986 & Supp. 1999), Christopher Garris's mother, Celestine Garris (Garris), brought suit in the United States District Court for the Eastern District of Virginia against Norfolk and Gresham, seeking recovery for wrongful death based upon negligence under general maritime law and the Virginia wrongful-death statute. According to Garris, the crane operator's negligence and Norfolk's use of an inadequate communication signaling system were the reasons for her son's death. The district court dismissed her suit on the ground that general maritime law does not recognize a negligence-based cause of action.[1]

Garris argues on appeal that the Supreme Court's holding in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), which recognized a general maritime law cause of action for wrongful death based upon unseaworthiness, also established a general maritime law cause of action for wrongful death based upon negligence. In the alternative, Garris asks us to extend the holding of *Moragne* to create a general maritime law cause of action for wrongful death based upon negligence. Reviewing this legal question de novo, *see Meekins v. United Transp. Union*, 946 F.2d 1054, 1057 (4th Cir. 1991) ("We review the district court's determinations of law de novo."), we conclude that the principles developed

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1. The district court dismissed with prejudice Garris's general maritime law wrongful-death claim. The district court dismissed without prejudice her state law claim under the Virginia wrongful-death statute. Garris has not appealed the district court's dismissal of her state law claim and has since filed that claim in state court only against Gresham.

in *Moragne* and its progeny compel us to recognize a negligence-based action. We, therefore, reverse the district court's dismissal of this claim and remand for further proceedings.

II.

In order to determine whether the district court erred in dismissing Garris's suit, we must first consider whether the Supreme Court in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), intended to create a general maritime law cause of action for wrongful death based upon negligence. Accordingly, we must examine the language and context of *Moragne*, including the events and developments leading up to the Supreme Court's decision in that case.

A. Pre-*Moragne*

Our discussion begins with *The Harrisburg*, 119 U.S. 199 (1886), *overruled by Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), in which the Supreme Court held that general maritime law did not allow recovery for wrongful death. In *The Harrisburg*, the widow and child of the decedent, Rickards, sought to recover damages for Rickards's death "caused by the negligence of the steamer" that collided with Rickards's schooner. *See id.* at 199. The Court had to determine whether Rickards's survivors could recover for wrongful death absent a state statute or act of Congress affirmatively allowing such recovery. *See id.* at 204. The Court noted that at common law there was no civil action for an injury that resulted in death and that English maritime law also had no cause of action for wrongful death on the high seas. *See id.* The Court concluded that because

> it is now established that in the courts of the United States no action at law can be maintained for [wrongful death] in the absence of a statute giving the right, and it has not been shown that the maritime law, as accepted and received by maritime nations generally, has established a different rule for the government of the courts of admiralty from those which govern courts of law in matters of this kind, we are forced to the conclusion that no such action will lie in the courts of the United States under the general maritime law.

Id. at 213.

Despite the rule of *The Harrisburg*, which prohibited recovery for wrongful death under general maritime law, two significant developments in maritime law softened the harshness of *The Harrisburg*. First, in 1920, Congress enacted both the Death on the High Seas Act (DOHSA), 46 U.S.C.A. §§ 761-768 (West 1975 & Supp. 1999), and the Jones Act, 46 U.S.C.A. app. § 688 (West Supp. 1999), which afforded recovery for wrongful death in certain circumstances.[2]

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2. DOHSA provides, in pertinent part, that "[w]henever the death of a person shall be caused by wrongful act . . . occurring on the high seas beyond a marine league from the shore of any State . . . the personal representative of the decedent may maintain a suit for damages in the district courts of the United States." 46 U.S.C.A. § 761 (West 1975). DOHSA, therefore, provides a federal claim for the wrongful death of any person that occurs more than a marine league, or three miles, from shore.

(Cont'd)

Second, federal courts began to recognize the application of state wrongful-death statutes to fatal accidents that occurred in state territorial waters. *See Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 206-08 (1996) (describing the response of "[f]ederal admiralty courts [in] temper[ing] the harshness of *The Harrisburg*'s rule by allowing recovery under state wrongful-death statutes"); *Western Fuel Co. v. Garcia*, 257 U.S. 233, 242 (1921) (finding that California's wrongful-death statute applied to the death of a maritime worker in state territorial waters). Consequently, in the years that followed *The Harrisburg*, state wrongful-death statutes — which often encompassed wrongful-death causes of action based upon negligence, but not unseaworthiness, *see Moragne*, 398 U.S. at 398-99 — "proved an adequate supplement to federal maritime law[ ] until a series of this Court's decisions transformed the maritime doctrine of unseaworthiness into a strict liability rule."[3] *Yamaha*, 516 U.S. at 207-08. Because of this new development in maritime law, unseaworthiness, which originally was an obscure and rarely used cause of action for which many state wrongful-death statutes did not

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(Cont'd)

The Jones Act states that "[a]ny seaman who shall suffer personal injury in the course of his employment may . . . maintain an action for damages at law . . . and in case of death of such seaman as a result of any such personal injury the personal representative may maintain an action for damages at law. . . ." 46 U.S.C.A. app. § 688(a) (West Supp. 1999). Thus, the Jones Act permits recovery for the wrongful death of a seaman in all navigable waters.

3. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944), *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), and *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960), all set forth and developed the rule that a shipowner's liability for unseaworthiness is absolute.

account, evolved into a cause of action that "soon eclipsed ordinary negligence as the primary basis of recovery when a seafarer was injured or killed." *Id.* at 208. The evolution of the unseaworthiness doctrine, however, also created gaps in the law whereby recovery for wrongful death based upon unseaworthiness could depend on mere happenstance. For example, if death occurred within state territorial waters, then recovery was unlikely because many state wrongful-death statutes did not include causes of action based upon unseaworthiness. *See Moragne*, 398 U.S. at 395. By contrast, if the death occurred more than three miles from shore, then recovery for wrongful death based upon unseaworthiness was possible under DOHSA. *See id.* The emergence of unseaworthiness as a viable and powerful tool for asserting claims against shipowners, and the discrepancies that necessarily followed, set the stage for *Moragne*, which gave the Supreme Court the opportunity to revisit the vitality and soundness of *The Harrisburg* in light of the changing maritime landscape.

B. *Moragne v. States Marine Lines, Inc.*

Moragne was a longshoreman who was killed aboard a ship in Florida's navigable waters. *See Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 376 (1970). His widow sued in state court for wrongful death based upon unseaworthiness and negligence. *See id.* After removal to federal court, the district court dismissed her unseaworthiness claim, holding that general maritime law did not permit recovery for wrongful death based upon unseaworthiness in state territorial waters, and, unlike her negligence-based claim, Florida's wrongful-death statute did not encompass

wrongful-death based upon unseaworthiness. *See id.* The only issue on appeal, therefore, was whether general maritime law recognized a cause of action for wrongful death based upon unseaworthiness. *See id.* at 377.

The Court's analysis began with *The Harrisburg*, which, as noted above, based its holding upon the premise that neither American nor English common law recognized civil actions for injuries that resulted in death. The *Moragne* Court, however, concluded that the Court's construction of the common law rule in *The Harrisburg* "was based upon a particular set of factors that had, when *The Harrisburg* was decided, long since been thrown into discard even in England, and that had never existed in this country at all." *Id.* at 381. Moreover, the Court noted that significant developments in American maritime law had further undercut *The Harrisburg*, including the emergence of state wrongful-death statutes and Congress's enactment of DOHSA and the Jones Act. *See id.* at 390. The Court stated that

> the work of the legislatures has made the allowance of recovery for wrongful death the general rule of American law, and its denial the exception. Where death is caused by the breach of a duty imposed by federal maritime law, Congress has established a policy favoring recovery in the absence of a legislative direction to except a particular class of cases.

Id. at 393. The Court, therefore, found it necessary to address "whether Congress has given such a direction [to deny recovery for wrongful death under general maritime law] in

its legislation granting remedies for wrongful deaths in portions of the maritime domain." *Id.*

Examining the Jones Act and DOHSA to determine if they should be construed to preclude a general maritime cause of action for wrongful death within state territorial waters, the *Moragne* Court pointed to three anomalies that would be perpetuated if Congress had indeed intended the Jones Act and DOHSA to preclude such recovery. First, identical conduct violating federal law in state territorial waters, such as the furnishing of an unseaworthy ship, would give rise to liability only if the victim were injured, but not killed. *See id.* at 395. Second, identical violations of the duty to furnish a seaworthy ship that resulted in death would give rise to liability for unseaworthiness under DOHSA more than three miles from shore but not within three miles of shore if the state's wrongful-death statute did not encompass unseaworthiness claims. *See id.* Third, a seaman, covered by the Jones Act, would have no cause of action for unseaworthiness while a longshoreman "to whom the duty of seaworthiness was extended only because he performs work traditionally done by seamen, [would have] such a remedy when allowed by a state statute." *Id.* at 395-96. Based upon these obvious anomalies, which arose from the emergence of unseaworthiness as a viable and prominent maritime cause of action, the Court concluded that Congress could not have intended to foreclose wrongful-death remedies in state territorial waters when it passed the Jones Act and DOHSA. The Court reasoned instead that "[t]he void that existed in maritime law up until 1920 [when Congress enacted DOHSA] was the absence of any remedy for wrongful death on the high seas. Congress, in acting to fill

that void, legislated only to the three-mile limit because that was the extent of the problem." *Id.* at 398. Congress did not need to extend its reach into state territorial waters because "[t]he beneficiaries of persons meeting death on territorial waters did not suffer at that time from being excluded from the coverage of [DOHSA]," largely because "the primary basis for recovery under state wrongful death statutes was negligence" and unseaworthiness was a little used cause of action. *Id.* However,

> [s]ince that time the equation has changed drastically, through this Court's transformation of the shipowner's duty to provide a seaworthy ship into an absolute duty not satisfied by due diligence. The unseaworthiness doctrine has become the principal vehicle for recovery by seamen for injury or death, overshadowing the negligence action made available by the Jones Act; and it has achieved equal importance for longshoremen and other harbor workers to whom the duty of seaworthiness was extended because they perform work on the vessel traditionally done by seamen. The resulting discrepancy between the remedies for deaths covered by [DOHSA] *and for deaths that happen to fall within a state wrongful-death statute not encompassing unseaworthiness* could not have been foreseen by Congress.

Id. at 399 (internal citations omitted and emphasis added).

The Court concluded that the unforeseen development of unseaworthiness as a primary means of recovery under

maritime law — and not a congressional intent to foreclose recovery for wrongful death in state territorial waters — was the primary reason for the anomalies that had emerged after *The Harrisburg*. *See id.* at 399-400. Noting that its recognition of unseaworthiness as a general maritime law wrongful-death cause of action furthered Congress's stated purpose of "uniformity in the exercise of admiralty jurisdiction" in enacting the Jones Act, *id.* at 401 (internal quotation marks omitted), the Court overruled *The Harrisburg*, and stated that "[w]e do not regard the rule of *The Harrisburg* as a closely arguable proposition — it rested on a most dubious foundation when announced [and] has become an increasingly unjustifiable anomaly as the law over the years has left it behind," *id.* at 404. Concluding that its decision "d[id] not require the fashioning of a whole new body of federal law, but merely remov[al of] a bar to access to the existing general maritime law," *id.* at 405-06, the Court held that "an action does lie under general maritime law for death caused by violation of maritime duties," *id.* at 409.[4]

Our examination of the language and context of *Moragne* reveals three crucial points that guide our analysis. First,

4. Two years after the Court's decision in *Moragne*, Congress passed the 1972 amendments to the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C.A. §§ 901-950 (West 1986 & Supp. 1999), and specifically eliminated unseaworthiness as a cause of action for wrongful death as it related to longshoremen and harbor workers, such as Garris's son. *See* 33 U.S.C.A. § 905(b) (West 1986) ("The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness. . . ."). The general maritime law cause of action for wrongful death based upon unseaworthiness still remains viable for true seamen. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 30 (1990).

the sole issue on appeal in *Moragne* was whether general maritime law recognized a wrongful-death cause of action based upon unseaworthiness; negligence was simply not an issue before the Court. *See id.* at 377. Second, the Court in *Moragne* referred repeatedly to unseaworthiness without expressly mentioning negligence. *See Ford v. Wooten*, 681 F.2d 712, 715 (11th Cir. 1982) (noting that *Moragne* mentioned unseaworthiness but never expressly discussed negligence); *Ivy v. Security Barge Lines, Inc.*, 606 F.2d 524, 527 (5th Cir. 1979) (en banc) ("[*Moragne*] dealt only with an unseaworthiness claim asserted under general maritime law."). Third, the unforeseen evolution of the unseaworthiness doctrine as a powerful tool for recovery under maritime law was the stated predicate for the Court's analysis, and indeed, it played a large part in the Court's decision to overrule *The Harrisburg*. As the Court later recognized in *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996), "[t]he disparity between the unseaworthiness doctrine's strict-liability standard and negligence-based state wrongful-death statutes figured prominently in our landmark *Moragne* decision." *Id.* at 208.

The *Moragne* Court's clear focus on unseaworthiness, as opposed to maritime duties as a whole, is most evident in the Court's analysis of the three anomalies that arose after the emergence of unseaworthiness as a strict liability doctrine. Two of the three anomalies identified by the Court in *Moragne* were that: (1) identical violations of the duty of seaworthiness, each resulting in death, could give rise to liability more than three miles from shore but not within the territorial waters of a state that did not include unseaworthiness in its wrongful-death statute, and (2) a seaman, covered by the Jones Act, would have no cause of action for

unseaworthiness while a longshoreman "to whom the duty of seaworthiness was extended only because he performs work traditionally done by seamen, [would have] such-a remedy when allowed by a state statute." *Id.* at 395-96. The Court framed these two anomalies specifically in terms of unseaworthiness; these anomalies were cause for concern only within that context. The third anomaly, that identical violations of federal law, such as the furnishing of an unseaworthy vessel, would give rise to liability if the victim was injured but not killed if the state wrongful-death statute did not encompass unseaworthiness, *see id.* at 395, arguably might have applied to negligence-based actions, at least to the extent that state wrongful-death statutes did not include a cause of action for negligence-based wrongful death. As the Court noted in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), however, every state had a wrongful-death statute that did provide recovery for negligence-based actions even where the state did not provide similar recovery for unseaworthiness-based actions. *See id.* at 25. Consequently, none of these three anomalies, which played a prominent role in the *Moragne* Court's decision, applied equally between a general maritime law cause of action for wrongful death based upon unseaworthiness and a general maritime law cause of action for wrongful death based upon negligence. We have no difficulty concluding that *Moragne* recognized only a general maritime law cause of action for wrongful death based upon unseaworthiness.

C. Post-*Moragne*

Garris argues, nevertheless, that the Supreme Court's later decision in *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996), suggests that *Moragne*'s holding was broader

than a simple recognition of a general maritime law cause of action for wrongful death based upon unseaworthiness. In *Yamaha*, the Supreme Court addressed whether state remedies remain applicable in "maritime wrongful-death cases in which no federal statute specifies the appropriate relief and the decedent was not a seaman, longshore worker, or person otherwise engaged in a maritime trade." *Id.* at 202. The Court held that "state remedies remain applicable in such cases and have not been displaced by the federal maritime wrongful-death action recognized in [*Moragne*]." *Id. Yamaha* involved a jet ski accident that occurred in navigable waters. The parents of the decedent sued the jet ski manufacturer, which responded that state remedies were not applicable to accidents in navigable waters and that federal maritime law controlled to the exclusion of state law. The Court, therefore, had to address whether "the federal maritime claim for wrongful death recognized in *Moragne* suppl[ies] the exclusive remedy in cases involving the deaths of nonseafarers in territorial waters." *Id.* at 205. In deciding that federal maritime claims for wrongful death did not displace state remedies, the Court briefly discussed *Moragne* and included two footnotes that, according to Garris, support her position. The first, footnote seven, states that

> [i]f *Moragne*'s wrongful-death action did not extend to nonseafarers like [the decedent], one could hardly argue that *Moragne* displaced the state-law remedies the Calhouns seek. Lower courts have held that *Moragne*'s wrongful-death action extends to nonseafarers. We assume, for purposes of this decision, the correctness of that position. Similarly, as in prior encounters, we

> assume without deciding that *Moragne* also provides a survival action. The question we confront is not what *Moragne* added to the remedial arsenal in maritime cases, but what, if anything, it removed from admiralty's stock.

Id. at 211 n.7 (internal citations omitted). The other, footnote eleven, states that "[w]hile unseaworthiness was the doctrine immediately at stake in *Moragne*, the right of action, as stated in the Court's opinion, is 'for death caused by violation of maritime duties.' " *Id.* at 214 n.11 (citing, *inter alia*, *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630 (1959) (stating that negligence is a violation of a maritime duty), and G. Gilmore & C. Black, The Law of Admiralty 368 (2d ed. 1975)).[5]

Garris argues that these footnotes demonstrate that the Court interprets *Moragne* as recognizing a right of action

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5. G. Gilmore & C. Black, *The Law of Admiralty* 368 (2d ed. 1975) states that "[f]rom Justice Harlan's discussion of the 'anomalies' which the *Moragne* decision was designed to avoid several conclusions clearly follow. . . . The remedy provides recovery for deaths caused by negligence as well as for deaths caused by unseaworthiness. . . ." We note that this treatise offers no analysis to support its assertion that *Moragne* created a general maritime law cause of action for wrongful death based upon negligence. As discussed above, we construe the *Moragne* Court's analysis of the three anomalies differently than Gilmore & Black and conclude that the three anomalies applied only in the context of unseaworthiness. *See supra* part II.B. (discussing the three anomalies). At least one circuit has expressly rejected Gilmore & Black's reading of *Moragne*. *See Ford v. Wooten*, 681 F.2d 712, 717 n.4 (11th Cir. 1982) (referring to "Gilmore & Black's unsubstantiated assertion that negligence is actionable under *Moragne*").

"for death caused by violation of maritime duties," including negligence. *Moragne*, 398 U.S. at 409. We disagree. Although footnotes seven and eleven, read by themselves, arguably support Garris's position, particularly footnote eleven's reference to "the right of action" as being for the "violation of maritime duties," we note that the Court in footnote seven expressly refrained from addressing this question: "The question we confront is not what *Moragne* added to the remedial arsenal in maritime cases, but what, if anything, it removed from admiralty's stock." *Yamaha*, 516 U.S. at 210 n.7. Moreover, the Court in *Yamaha* recognized that *Moragne* relied in large part on unseaworthiness, stating explicitly that "[t]he disparity between the unseaworthiness doctrine's strict liability standard and negligence-based state wrongful-death statutes figured prominently in our landmark *Moragne* decision," *id.* at 208, and that "[t]he uniformity concern that drove our decision in *Moragne* related . . . to the availability of unseaworthiness as a basis of liability," *id.* at 211. *Yamaha*'s recognition of the historical and legal context of *Moragne* further supports our belief that *Moragne* was a limited holding that came in response to a set of concerns that arose specifically in the context of unseaworthiness.

Our conclusion is bolstered by those few circuits that have addressed this issue. In *Ford v. Wooten*, 681 F.2d 712 (11th Cir. 1982), for example, the Eleventh Circuit refused to construe *Moragne* as creating a general maritime law cause of action for wrongful death based upon negligence, stating that *Moragne*, "which mentioned unseaworthiness but never expressly discussed negligence, pertained only to an unseaworthiness claim." *Id.* at 715. Likewise, in *Ivy v. Security Barge Lines, Inc.*, 606 F.2d 524 (5th Cir. 1979)

(en banc), the Fifth Circuit recognized that "*Moragne* did not create or even discuss an action for negligence; it dealt only with death occasioned by unseaworthiness." *Id.* at 527. Even the case upon which Garris relies, *Nelson v. United States*, 639 F.2d 469 (9th Cir. 1980), supports our conclusion that *Moragne* did not itself recognize a general maritime law cause of action for wrongful death based upon negligence. In *Nelson*, the Ninth Circuit addressed "whether or not the Government owes a duty of care to the employees of an independent contractor which has been engaged by the Government to perform hazardous maritime work." *Id.* at 470. In determining the "[t]he precise nature of plaintiff's cause of action," the court noted that prior to *Moragne*,

> there was no general maritime common law cause of action for wrongful death; state wrongful death acts were applied by federal courts sitting in admiralty. We have found no case deciding whether a *Moragne* suit may be based upon negligence as well as unseaworthiness. *We hold that the need for uniformity in maritime wrongful death actions requires extension of Moragne to cover claims based on negligence, to the exclusion of state wrongful death statutes.*

Id. at 473 (internal citation omitted and emphasis added). Thus, although the court found it appropriate to extend *Moragne*, it also recognized that *Moragne* did not itself create a general maritime law cause of action for wrongful death based upon negligence.[6]

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6. Indeed, Garris can point to only one federal court of appeals that has construed *Moragne* consistently with her position. In (Cont'd)

Finally, Garris correctly notes that the *Moragne* Court referred to maritime duties in its holding: "We accordingly overrule *The Harrisburg*, and hold that an action does lie under general maritime law for death caused by violation of maritime duties." *Id.* at 409. We do not believe, however, that this vague reference to "maritime duties," taken in the context of the entire decision and the events prompting that decision, is sufficient to counterbalance the *Moragne* Court's otherwise clear reliance on unseaworthiness as the basis for its decision. The context under which *Moragne* was decided speaks volumes; neither the events leading up to *Moragne* — specifically, the emergence of unseaworthiness as a strict

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Wahlstrom v. Kawasaki Heavy Indus., 4 F.3d 1084 (2d Cir. 1993), the Second Circuit addressed whether "actions brought under the federal courts' admiralty jurisdiction are governed solely by federal maritime law." *Id.* at 1085. The court, after a brief discussion of *Moragne*, noted that

> [t]he Court was addressing the specific issue of what, if any remedy should be available for a wrongful death caused within state territorial waters by a vessel's unseaworthiness, a claim for which there was no right of recovery under applicable state law. In fashioning the remedy, however, the Supreme Court did not limit the new right of recovery to unseaworthiness claims, but instead established a general remedy for wrongful death under maritime law.

Id. at 1088-89 (internal citation omitted). Garris has not offered, nor have we found, another federal court of appeals decision that has adopted *Wahlstrom*'s reading of *Moragne*. For the reasons stated above, we disagree with the Second Circuit's reading of *Moragne*.

liability doctrine and its absence in many state wrongful-death statutes — nor the Court's analysis of the three anomalies, framed in the specific context of unseaworthiness, apply equally to negligence-based actions.[7]

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7. Garris argues that notwithstanding the limited issue before the Court in *Moragne* and its historical context, the *Moragne* Court must have intended to recognize a cause of action of wrongful death for all breaches of maritime duties because it explicitly overruled *The Harrisburg*, which held, in the context of a wrongful-death cause of action based upon negligence under general maritime law, that general maritime law did not afford recovery for wrongful death. Garris argues that "[i]f the Court meant to limit its holding to unseaworthiness, it would have merely distinguished *The Harrisburg*." (Appellant's Br. at 7.) The Court in *The Harrisburg*, however, relied explicitly upon *Insurance Co. v. Brame*, 95 U.S. 754 (1877), which held "that by the common law no civil action lies for an injury which results in death." *Id.* at 756. The Court in *The Harrisburg* found no reason to apply a different rule in admiralty than at common law, and, therefore, concluded that there could be no civil action for wrongful death in admiralty absent a relevant statute. *See The Harrisburg*, 119 U.S. at 213-14. Thus, although the issue before the Court in *The Harrisburg* had to do only with negligence-based wrongful-death actions, its rationale was applicable to all forms of wrongful death. The *Moragne* Court, therefore, had to overrule, rather than distinguish, *The Harrisburg* in order to create a general maritime law cause of action for wrongful death based upon unseaworthiness. The *Moragne* Court's necessary step of overruling *The Harrisburg* does not suggest, as Garris argues, that it actually intended to recognize a general maritime law cause of action for wrongful death based upon negligence that was not before it on appeal.

We note that the Court in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), read *Moragne* as recognizing a general maritime

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Our reading of *Moragne*, both from the Court's language and the context in which it was decided, as well as its subsequent interpretation, leads us to the inescapable conclusion that *Moragne* was, both at its heart and in its facts, an unseaworthiness case. We, therefore, agree with the district court and conclude that *Moragne* did not recognize a general maritime law cause of action for wrongful death based upon negligence.

III.

Having concluded that *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), did not create a general maritime law cause of action for wrongful death based upon negligence, we must now decide whether to extend *Moragne*

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law cause of action for wrongful death based upon unseaworthiness for seamen, as opposed to only longshoremen, partially because "*Moragne* explicitly overruled *The Harrisburg*. *The Harrisburg* involved a true seaman." *Id.* at 30 (internal citation omitted). The other basis for the *Miles* Court's reading of *Moragne*, however, was that "all three of the 'anomalies' to which the *Moragne* cause of action was directed involved seamen. . . . It would be strange indeed were we to read *Moragne* as not addressing a problem that in large part motivated its result." *Id.* The Court in *Miles*, therefore, recognized a general maritime law cause of action for wrongful death based upon unseaworthiness for seamen partially because the reasoning applied equally between seamen and longshoremen. Here, however, unlike in *Miles*, the reasoning does not apply equally between unseaworthiness and negligence; the three "anomalies" in *Moragne* related specifically to a wrongful-death cause of action based upon unseaworthiness and had little relation to a wrongful-death cause of action based upon negligence.

to recognize such a cause of action. Because the creation of a negligence-based wrongful-death action is consistent with the principles of uniformity and consistency that formed the basis of *Moragne*, and because Congress has not affirmatively precluded a negligence-based wrongful-death claim, we find it appropriate to recognize a general maritime law cause of action for wrongful death based upon negligence.

In deciding to recognize a general maritime law cause of action for wrongful death based upon unseaworthiness, the *Moragne* Court concluded that

> the work of the legislatures has made the allowance of recovery for wrongful death the general rule of American law, and its denial the exception. Where death is caused by the breach of a duty imposed by federal maritime law, Congress has established a policy favoring recovery in the absence of a legislative direction to except a particular class of cases.

Id. at 393. Applying this principle, the *Moragne* Court examined the Jones Act and DOHSA to determine whether Congress had expressed an intent to preclude a general maritime law cause of action for wrongful death based upon unseaworthiness. The *Moragne* Court rejected the argument that DOHSA's failure to account for an unseaworthiness-based claim reflected a congressional intent to foreclose that cause of action. The *Moragne* Court, pointing to the three anomalies described above, noted that "[t]he resulting discrepancy between the remedies for deaths covered by [DOHSA] and for deaths that happen to fall within a state

wrongful-death statute not encompassing unseaworthiness could not have been foreseen by Congress." *Id.* at 399. The *Moragne* Court concluded that the absence of an unseaworthiness-based wrongful-death cause of action in DOHSA did not evidence a congressional intent to foreclose such a cause of action because "no intention appears that [DOHSA] have the effect of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law." *Id.* at 400. The *Moragne* Court reasoned, instead, that creation of a general maritime law cause of action for wrongful death based upon unseaworthiness was consistent with the purpose of the Jones Act, which

> was intended to achieve uniformity in the exercise of admiralty jurisdiction by giving seamen a federal right to recover from their employers for negligence regardless of the location of the injury or death. That strong concern for uniformity is scarcely consistent with a conclusion that Congress intended to require the present nonuniformity in the effectuation of the duty to provide a seaworthy ship.

Id. at 401 (internal quotation marks omitted). The *Moragne* Court concluded that "Congress has given no affirmative indication of an intent to preclude the judicial allowance of a remedy for wrongful death to persons in the situation of this petitioner." *Id.* at 393.

The *Moragne* Court's examination of the three anomalies, the Jones Act, and DOHSA is instructive. It

demonstrates an analytical framework under which the *Moragne* Court created a general maritime law cause of action for wrongful death based upon unseaworthiness under circumstances where: (1) Congress had not affirmatively expressed an intention to bar such a cause of action; and (2) creation of that cause of action was consistent with the policies of general maritime law articulated in the Jones Act — uniformity in the exercise of admiralty jurisdiction.

This analytical framework likewise applies in the present case and counsels in favor of recognizing a *Moragne* action based upon negligence.[8] In the present case, Garris has no right of recovery under the existing statutory scheme. Garris cannot recover under DOHSA because her son died within state territorial waters. She cannot recover under the Jones Act because her son was a harbor worker, and not a seaman. And, she apparently cannot recover against Norfolk under the Virginia wrongful-death statute because the Virginia worker's compensation statute confers broader immunity than the LHWCA; unlike the LHWCA, which bars suit only against the immediate employer,[9] the Virginia statute bars

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8. A "*Moragne* action" or "*Moragne* cause of action" is simply another term for a general maritime law cause of action for wrongful death. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 30 (1990) (referring to a "*Moragne* cause of action" in deciding whether to apply a general maritime law wrongful-death action to seamen); *Miller v. American President Lines, Ltd.*, 989 F.2d 1450, 1457 (6th Cir. 1993) (referring to a "*Moragne* action").

9. The LHWCA sets forth the exclusive remedies for a longshoreman or harbor worker's injury or death "occurring upon

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state tort claims against contractors as well as immediate employers.[10] *See* Va. Code Ann. §§ 65.2-302, 307 (Michie Supp. 1999); *Ward v. Norfolk Shipbuilding & Drydock Corp.*, 770 F. Supp. 1118, 1120 (E.D. Va. 1991) ("Under the Virginia Act, a contractor such as Norshipco is the 'statutory employer' of a subcontractor's or sub-subcontractor's employee, and therefore liable for compensation to such an employee. The exclusivity provision of the Virginia Act makes the contractor immune from suit for negligence, provided the subcontractors were performing the 'normal work' of the contractor. The LHWCA reaches the opposite result with respect to the liability of a contractor to a subcontractor's injured employee."); *cf. Garvin v. Alumax of South Carolina*, 787 F.2d 910, 918 (4th Cir. 1986) ("Congress has diligently attempted to preserve state law governance of state law third party claims by recipients of

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the navigable waters of the United States," including adjoining piers or dry docks, *see* 33 U.S.C.A. § 903(a) (West 1986), for injuries caused by a maritime employer, co-employee, or vessel. *See* 33 U.S.C.A. §§ 905, 933(i) (West 1986). The LHWCA requires the employer, *inter alia*, to compensate the injured longshoreman or harbor worker for certain disability costs, recovery costs, and to provide death benefits to certain beneficiaries. *See* 33 U.S.C.A. §§ 906-910, 914 (West 1986). It also permits the longshoreman or harbor worker to sue the employer if the employer fails to pay the prescribed benefits. *See* 33 U.S.C.A. § 905(a). As part of this compensation scheme, the LHWCA confers immunity to an immediate employer from tort suits by injured employees. *See id.*

10. That is presumably why Garris has sued only Gresham, and not Norfolk, in state court under the Virginia wrongful-death statute.

LHWCA compensation. Since there is no conflict between differing rules of immunity and application of South Carolina's rule [granting immunity to contractors] will not frustrate the effectiveness of any federal law . . . the contractor [ ] is immune from this state tort claim."). In other words, because Garris's son was a harbor worker who happened to be killed in Virginia's territorial waters, Garris cannot recover against Norfolk absent a federal maritime law cause of action for wrongful death based upon negligence.

We see no reason to deny Garris a basis of recovery simply because her son was a harbor worker who died in Virginia, as opposed to another state that permits recovery against contractors. First, Congress has not affirmatively expressed an intent to preclude a negligence-based wrongful-death cause of action against a third party. As the Court noted in *Moragne*, DOHSA does not preclude a "nonstatutory federal remed[y] that might be found appropriate to effectuate the policies of general maritime law." *Moragne*, 398 U.S. at 400. And, like DOHSA, the LHWCA does not evidence a congressional intent to preclude a general maritime law cause of action against third parties for wrongful death based upon negligence.[11] Second, recognition of a general maritime law

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11. The LHWCA generally does not address rights of recovery against third parties except in one instance: the LHWCA eliminated unseaworthiness as a cause of action against the vessel with respect to longshoremen and harbor workers and replaced that cause of action by permitting longshoremen and harbor workers to bring suit for negligence "against [the] vessel as a third party." *See* 33 U.S.C.A. § 905(b) (West 1986); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 28 (1990) ("If Moragne's widow brought her action today, it would be

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cause of action for wrongful death based upon negligence "effectuate[s] the policies of general maritime law" because it is consistent with the policy of achieving uniformity in admiralty law. *Id.* at 400. The location of a harbor worker's death — a fact of true happenstance — should not determine

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foreclosed by statute."); *Garvin v. Alumax of South Carolina*, 787 F.2d 910, 917 (4th Cir. 1986) ("Except with respect to claims against vessels addressed in 33 U.S.C.A. § 905(b), the LHWCA does not address the substantive rights of claimants against third parties.").

We recognize that Congress's removal of the unseaworthiness cause of action for longshoremen and harbor workers reduced their overall right of recovery. *See Holland v. Sea-Land Serv., Inc.*, 655 F.2d 556, 558-59 (4th Cir. 1981) (stating that Congress "substantially limited the right of longshoremen to recover from third parties in tort actions" by eliminating unseaworthiness as a cause of action, but "preserve[d] his right under prior law to recover for third party negligence"). This restriction of rights, however, occurred within the limited context of unseaworthiness, and for a very specific reason: " '[t]he rationale which justifies holding the vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to longshoremen and other non-seamen working on board a vessel while it is in port.' " *Harwood v. Partredereit AF 15.5.81*, 944 F.2d 1187, 1198 (4th Cir. 1991) (Ervin, J., dissenting) (quoting H.R. Rep. No. 92-1441, 92nd Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News 4698, 4703). We do not believe that this limited curtailment of longshoremen and harbor workers' rights is inconsistent with our recognition of a general maritime law cause of action against third parties for wrongful death based upon negligence, nor does it express an affirmative congressional intent to preclude such a cause of action. Indeed, the LHWCA expressly leaves intact a longshoreman or harbor worker's rights against all other third parties except the employer and "persons in the same employ." *See* 33 U.S.C.A. § 933(i) (West 1986).

an injured party's ability to recover for wrongful death.[12] Because such a cause of action is consistent with the framework set forth in *Moragne*, we hold that a general maritime law cause of action against third parties for wrongful death based upon negligence is available where a

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12. Our recognition of a federal cause of action for wrongful death based upon negligence does not conflict with *Garvin v. Alumax of South Carolina*, 787 F.2d 910 (4th Cir. 1985), in which we held that South Carolina's worker's compensation statute conferred immunity to a contractor from an injured longshoreman's state tort action even though the injured longshoreman received benefits only under the LHWCA. *See id.* at 918. In *Garvin*, we noted that "[t]he federal immunity rule is to be applied when a third party claim is a federal claim; when the third party claim is a state law claim, the immunity rules of that state are to be applied." *Id.* at 917. Because *Garvin* dealt only with a state claim, and not a federal claim, *Garvin* is not inconsistent with our decision in the present case.

Nor does a negligence-based *Moragne* cause of action violate "important federalism principles" by impermissibly interfering with Virginia's grant of immunity to Norfolk under state law. (Appellee's Br. at 21.) First, the broader Virginia immunity rule would still apply to any state tort actions brought by Garris. To that extent, a *Moragne* cause of action does not interfere with state law at all. Second, although "[f]ederal maritime law has long accommodated the States' interest in regulating maritime affairs within their territorial waters . . . . Permissible state regulation . . . must be consistent with federal maritime principles and policies." *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 215 n.13 (1996). *Cf. Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409-10 (1953) ("While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretive decisions of this Court."). Accordingly, Norfolk's federalism argument does not deter us from recognizing a *Moragne* cause of action in this context.

harbor worker, such as Garris's son, dies within state territorial waters.[13] For that reason, we reverse the district

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13. We recognize that the Supreme Court, in *Dooley v. Korean Air Lines Co.*, 118 S.Ct. 1890 (1998), declined to extend general maritime law to permit recovery for pre-death pain and suffering under a general maritime law survival cause of action. *See id.* at 1895. In *Dooley*, the Court rejected the argument that DOHSA, which does not authorize recovery for pre-death pain and suffering, did not bar such damages under general maritime law because DOHSA is a wrongful-death statute rather than a survival statute. *See id.* The Court stated that

> DOHSA expresses Congress' judgment that there should be no such cause of action in cases of death on the high seas. By authorizing only certain surviving relatives to recover damages, and by limiting damages to the pecuniary losses sustained by those relatives, Congress provided the exclusive recovery for deaths that occur on the high seas.

Id. at 1894-95. The Court noted that "[b]ecause Congress has already decided these issues, it has precluded the judiciary from enlarging either the class of beneficiaries or the recoverable damages." *Id.* at 1895. Moreover, "it cannot be contended that DOHSA has no bearing on survival actions; rather, Congress has simply chosen to adopt a more limited survival provision." *Id.* The Court concluded that "[e]ven in the exercise of our admiralty jurisdiction, we will not upset the balance struck by Congress by authorizing a cause of action with which Congress was certainly familiar but nonetheless declined to adopt." *Id.*

Unlike DOHSA, which addressed the remedy sought by the petitioners in *Dooley*, and, therefore, pervaded the field on that issue, the LHWCA does not address the third party cause of action that Garris seeks in the present case. In fact, as noted above, the LHWCA addresses third party rights only in the limited context of eliminating

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court's dismissal of Garris's general maritime law negligence-based claim and remand for further proceedings consistent with this opinion.

IV.

In conclusion, the language of *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), combined with its historical and legal context and the absence of persuasive authority to the contrary, leads us to conclude that *Moragne* recognized only a general maritime law cause of action for wrongful death based upon unseaworthiness and not for wrongful death based upon negligence. However, because Congress has not affirmatively precluded a negligence-based cause of action, and because such a cause of action is consistent with the principle of uniformity expressed in *Moragne* and *Miles v. Apex Marine Corp.*, 498 U.S. 19, 33 (1990) ("Today we restore a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law."), we find it appropriate to recognize a general maritime law cause of action for wrongful death based upon negligence. Accordingly, we reverse the district court's dismissal of Garris's general maritime law negligence-based claim and remand for further proceedings.

REVERSED AND REMANDED

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an unseaworthiness action against the vessel and replacing it with a negligence action against the vessel. Thus, unlike the Court in *Dooley*, we can find no congressional intent that precludes us from recognizing a *Moragne* cause of action against third parties other than vessels for wrongful death based upon negligence.

Appendix F

HALL, Senior Circuit Judge, concurring in the judgment:

Over the past three decades, Justice Harlan's opinion in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), has come to occupy an important place within the Supreme Court's canon. Generations of law students have studied *Moragne* for its scholarly discussion of legal process and the role of precedent. But before those students reach these abstract questions, their professors have no doubt tormented them by asking a seemingly simple question that defies a simple answer: What, precisely, is the holding of *Moragne*?

I.

The majority, which concludes in the first instance that *Moragne*'s holding is limited to wrongful death unseaworthiness claims, gives what is in many ways a reasonable answer to that thorny question — albeit one with which I cannot concur. And Part III of the majority opinion ultimately reaches the right result by finding a *Moragne* cause of action on the instant set of facts. The majority's explanation of why congressional silence and Appellant's lack of a state-law remedy warrant the creation of a federal admiralty remedy is particularly laudable. Because I would hold that *Moragne* already covers Appellant's claim, I find it unnecessary to reach Part III's analysis. But if I were inclined to interpret *Moragne* as narrowly as the majority does, I would certainly assent to Part III's sound discussion. Those words of explanation having been voiced, I shall explain why, in my view, *Moragne* itself created a cause of action for negligence-based wrongful death.

Appendix F

II.

In *The Harrisburg*, 119 U.S. 199 (1886), the Supreme Court held that general maritime law provided no cause of action for wrongful death. At the time, any successful wrongful death suit would have required the plaintiff to prove that the defendant acted negligently, and negligence was indeed the theory of liability pressed by *The Harrisburg* plaintiff and the only theory of negligence considered by the Supreme Court. *See id.* at 204.

Fifty-eight years later the Supreme Court recognized, for the first time, the doctrine of unseaworthiness. *See Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944); *see also Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 208 (1996) ("Prior to 1944, unseaworthiness was an obscure and relatively little used liability standard . . . .") (internal quotations marks omitted). In contrast to negligence, unseaworthiness is a strict liability theory flowing from the ship's owner to its crew, longshoreman, or harbor workers aboard the ship. *See Ballwanz v. Isthmian Lines*, 319 F.2d 457, 461 (4th Cir. 1963).

Twenty-six years after *Mahnich*, the Supreme Court decided *Moragne*, 398 U.S. at 375. In *Moragne* the plaintiff was a longshoreman's widow who brought an *unseaworthiness* suit against the owner of a ship on which her husband had perished. Like Appellant, the *Moragne* plaintiff's loved one had been killed while working aboard a vessel in navigable waters within a state's territorial waters. *See id.* at 376. Although no federal statute authorized recovery for the widow, the Supreme Court nevertheless allowed her suit to

proceed. In order to do so, the Supreme Court said it was compelled to overrule *The Harrisburg*, stare decisis considerations notwithstanding. In broad language, Justice Harlan, writing for a unanimous Court, announced the rule of *Moragne*: "We accordingly overrule *The Harrisburg*, and hold that an action does lie under general maritime law for death caused by violation of maritime duties." *Id.* at 409.

Two aspects of the *Moragne* opinion are of pivotal importance in the case at bar. First, the court explicitly announced that a cause of action exists for a "violation of maritime duties," not just for "unseaworthiness." Had the Court sought to limit its holding to unseaworthiness, it could have easily done so. Second, and relatedly, had the Supreme Court sought only to allow the plaintiff to recover in her unseaworthiness-based wrongful death action, it could easily have distinguished *The Harrisburg*. After all, *The Harrisburg* held that there was no general maritime law cause of action for negligence-based wrongful death suits, but *The Harrisburg* said nothing about the presence or absence of a general maritime law cause of action for unseaworthiness-based wrongful death suits, since the unseaworthiness theory of liability did not enter the Supreme Court's lexicon until fifty-eight years *after The Harrisburg* was handed down. But the Supreme Court consciously, and with much fanfare,[1]

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1. Justice Harlan's opinion in *Moragne* devotes seven fascinating pages to the "very weighty considerations" of stare decisis that augured against overruling *The Harrisburg*. *See Moragne*, 398 U.S. at 403-09. Anyone who reads this discussion comes away from it profoundly impressed with Justice Harlan's reverence for precedent and his reluctance to cast aside a controlling

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overruled *The Harrisburg* instead of distinguishing it.[2] In so

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precedent in the absence of compelling reasons to do so. Indeed, scholars have long appreciated Justice Harlan's particularly hardy reverence for precedent, *see, e.g.*, Louis R. Cohen, *A Biography of the Second Justice Harlan*, 91 Mich. L. Rev. 1609, 1612 (1992) (reviewing *Tinsley E. Yarbrough, John Marshall Harlan: Great Dissenter of the Warren Court* (1992)), and deep commitment to the principle of judicial restraint, *see, e.g.*, Stephen M. Dane, *"Ordered Liberty" and Self-Restraint: The Judicial Philosophy of the Second Justice Harlan*, 51 U. Cin. L. Rev. 545 (1982).

The majority today reads *Moragne* as having created a cause of action for unseaworthiness-based wrongful death suits, but not negligence-based wrongful death suits. Plainly, however, if the *Moragne* Court had favored such a distinction, Justice Harlan could have simply distinguished *The Harrisburg* by noting that it involved a negligence-based wrongful death cause of action, whereas *Moragne* involved an unseaworthiness-based wrongful death cause of action. By doing so, the Court could have avoided the unseemliness involved in overturning a well-established precedent. Two possibilities follow from the majority's holding today: Either *Moragne*'s overruling of *The Harrisburg* was mere dicta or Justice Harlan and his eight colleagues lacked the capacity to distinguish a case on its facts. I find neither notion plausible. A more satisfying reading of *Moragne*'s treatment of *The Harrisburg* is that the unanimous Court felt compelled to overrule *The Harrisburg*'s holding that general maritime law did not create a negligence-based wrongful death cause of action, and that the Court saw no logical basis for holding that general maritime law recognizes unseaworthiness-based wrongful death suits, but not negligence-based wrongful death suits.

2. The majority contends that *Moragne* had to overrule *The Harrisburg* because *The Harrisburg*'s "rationale was applicable

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doing, the Court must have believed that there was no principled basis for distinguishing between negligence-based wrongful death suits and unseaworthiness-based wrongful death suits under general maritime law. Yet that is precisely the distinction that the majority draws today.

In order to fully understand *Moragne*, courts have often looked to the three famous "anomalies" that *The Harrisburg* and pre-*Moragne* developments had wrought. *See, e.g.*, *Miller v. American President Lines*, 989 F.2d 1450, 1458 (6th Cir. 1993); *Bodden v. American Offshore, Inc.*, 681 F.2d 319, 323 (5th Cir. 1982). The *Moragne* Court was terribly troubled by these inconsistencies that had emerged in

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to all forms of wrongful death." Maj. op. at 15 n.7. In so doing, the majority emphasizes *The Harrisburg*'s reliance on *Insurance Co. v. Brame*, 95 U.S. 754 (1877), which held that under the common law, "actions for injuries to the person abate by death," *see id.* at 759. I fail to see why *Brame* alters the analysis. At the time of *The Harrisburg*, the common law recognized no wrongful death cause of action. Among the possible theories of liability, the only candidate for a wrongful death recovery action would have been negligence because, as I noted above, the strict-liability theory of wrongful death recovery would not make its way into American admiralty jurisprudence for another fifty-eight years. It is therefore not surprising that *The Harrisburg* Court considered the question before it in the narrowest of terms: "Can a suit in admiralty be maintained in the courts of the United States to recover damages for the death of a human being on the high seas, or waters navigable from the sea, *caused by negligence*, in the absence of an act of congress or a statute of a state giving a right of action therefor?" 119 U.S. at 204 (emphasis added). Thus, the majority's view appears to be that the *Moragne* Court read *The Harrisburg* to preclude a cause of action that had not yet been invented.

admiralty law, whereby a seaman might recover damages if injured within territorial waters, but not if killed within those same waters; whereby a seaman's estate could recover in an unseaworthiness action if he was killed on the high seas but not if killed within a state's territorial waters; and whereby a seaman's estate could not recover for wrongful death if he were killed within territorial waters, but a longshoreman's estate could. *See id.* at 395-96. By overruling *The Harrisburg* and removing these anomalies, the Court saw itself as assuring "uniform vindication of federal policies [by] removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts." *Id.* at 401.

The majority concludes that *Moragne*'s three anomalies are not directly implicated by the instant case. I disagree. The purpose of *Moragne* was to allow individuals who are, for all intents and purposes, equally situated, to obtain equal recoveries in the event of their deaths. In other words, happenstance should not determine whether an individual's heirs have a cause of action in the event of his untimely death. But, as the majority points out, Appellant's misfortune here is purely driven by happenstance. Maj. op. at 17-19. Had Garris been a seaman, Appellant would have had a wrongful death cause of action under the Jones Act or general maritime law. But because Garris was a longshoreman, the Jones Act is inapplicable, and Appellant is now unable to bring any suit under general maritime law. Had Garris's death resulted from the actions of the ship's owner, Appellant could have recovered under the Longshore & Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 905(b). But because his death allegedly resulted from the actions of subcontractors working

aboard the ship, such a remedy is not available to Appellant. I am hardly alone in understanding *Moragne*'s anomalies to be directly implicated by the set of facts presented in the instant case. To Grant Gilmore and Charles Black, two of their generation's towering legal minds, it "clearly follow[ed]" from *Moragne* that "The *Moragne* remedy . . . . provides recovery for deaths caused by negligence as well as for deaths caused by unseaworthiness." Grant Gilmore & Charles L. Black, Jr. *The Law of Admiralty* 368 (2d ed. 1974).

In 1980, a Ninth Circuit opinion cited page 368 of the Gilmore and Black treatise and largely agreed with those scholars' reading of *Moragne*. *See Nelson v. United States*, 639 F.2d 469, 473 (9th Cir. 1980). While observing that no post-*Moragne* published opinion had decided whether a *Moragne* suit "could be based on negligence as well as unseaworthiness," the court expressed sympathy for Gilmore and Black's view that the obvious implication of *Moragne* was that negligence suits were covered under the general maritime law. The Court held that the "need for uniformity in maritime wrongful death actions requires extension of *Moragne* to cover claims based on negligence, to the exclusion of state wrongful death statutes." *Id.* The majority reads *Nelson* as recognizing "that *Moragne* did not itself create a general maritime law cause of action for wrongful death based upon negligence." Maj. op. at 13. Although the question is admittedly close, I read no such analysis into *Nelson*, and believe the majority places too much emphasis on *Nelson*'s use of the word "extension."[3]

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3. When an opinion is obviously applicable to a nearly identical set of facts, it is nevertheless accurate to say that the opinion still must be "extended" to cover the second set of facts. Sometimes, (Cont'd)

Indeed, *Nelson*'s invocation of page 368 of Gilmore and Black suggests a contrary view.

As the majority recognizes, the Second Circuit has also held that *Moragne* created a negligence-based cause of action as well as an unseaworthiness-based cause of action. *See Wahlstrom v. Kawasaki Heavy Indus.*, 4 F.3d 1084 (2d Cir. 1993). The Second Circuit correctly held that the *Moragne* Court "did not limit the new right of recovery to unseaworthiness claims, but instead established a general remedy for wrongful death under maritime law." *Id.* at 1088-89. The majority's assertion that no court has adopted *Wahlstrom*'s reasoning is misleading. *Wahlstrom* is consistent with *Nelson*, and *Wahlstrom* was the last circuit court case to consider the issue that is before this Court today.

The majority seeks solace in an Eleventh Circuit case, but that reliance is somewhat misplaced. Admittedly, the Eleventh Circuit has held that *Moragne* does not create a negligence-based wrongful death cause of action "where a cause of action exists for wrongful death under DOHSA [the Death on the High Seas Act]." *Ford v. Wooten*, 681 F.2d 712, 716 (11th Cir. 1982). But it is undisputed that Appellant has no DOHSA remedy here, because Garris's injury occurred in territorial waters. In *Ford*, the Eleventh

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(Cont'd)
a minimal extension of the prior precedent to a situation clearly controlled by that precedent even warrants the publication of a subsequent opinion. *See, e.g., Boulahanis v. Board of Regents*, 198 F.3d 633 (7th Cir. 1999) (extending *Kelley v. Board of Trustees*, 35 F.3d 265 (7th Cir. 1994), while recognizing that *Kelley* plainly controlled the case at bar).

Circuit premised its opinion upon a balancing of interests where the interest in uniformity favored granting a remedy and "consistency with federal remedial schemes" favored withholding a remedy. The court held that "[a]t least *where statutory remedies exist*, we deem consistency with the federal remedial schemes to be more important than the somewhat limited loss of uniformity." *Id.* (emphasis added). Notably, a general maritime law cause of action would have conflicted with DOHSA because DOHSA "already provides a cause of action for death due to negligence." *Id.* Where, as in the case at bar, no federal statute authorizes or bars a recovery from the third party alleged to have caused Garris's death, there is nothing to balance the interest in uniformity, so *Moragne* creates a cause of action.[4]

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4. Both parties invoke the Fifth Circuit's precedents as supporting their respective readings of *Moragne*. Surprisingly, both parties appear to be correct. In *Ivy v. Security Barge Lines, Inc.*, 606 F.2d 524, 527 (5th Cir. 1979) (en banc), the Fifth Circuit held:

> Other reasons, somewhat more complex, appear to preclude interpreting the Jones Act as being supplemented by a *Moragne*-engendered negligence action for damages if (but only if) death occurs in territorial waters or on land. *Moragne* did not create or even discuss an action for negligence; it dealt only with death occasioned by unseaworthiness. The suggestion that the Jones Act measure of damages can be supplemented by the *Moragne*-cause-of-action-*Gaudet*-damages rule will not bear analysis . . . .

A decade later, the Fifth Circuit appears to have reversed course, observing that in "Moragne, the Supreme Court recognized a

(Cont'd)

Appendix F

Any lingering doubts about whether *Moragne* created a negligence-based wrongful death cause of action were laid to rest by the Supreme Court in 1996. In *Yamaha Motor Corp.*, 516 U.S. at 199, the Court held that *Moragne* did not preempt state law remedies for wrongful death resulting from injuries to nonseamen in territorial waters. But it is one of *Yamaha*'s footnotes, not its holding, that definitively resolves the instant case. Footnote 11 reads in pertinent part:

> While unseaworthiness was the doctrine immediately at stake in *Moragne*, the right of

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(Cont'd)
wrongful death action for negligence and unseaworthiness under the general maritime law." *Miles v. Melrose*, 882 F.2d 976, 985 (5th Cir. 1989), *aff'd sub nom. Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). Ordinarily, an en banc opinion would trump a panel opinion, but that might not be the case where, as here, the panel opinion post-dates the en banc opinion or where, as here, only the panel opinion was affirmed by the Supreme Court. The Fifth Circuit thus appears to find itself on both sides of a circuit split.

Nevertheless, the majority opinion cites *Ivy* as the current Fifth Circuit law. Maj. op. at 13. Assuming, *arguendo*, the correctness of that assessment, I would emphasize that *Ivy*'s holding is inapplicable to the case at bar. The *Ivy* court's analysis was animated by the problem of double recoveries for someone under *Moragne* and the Jones Act. Appellant, and those similarly situated, are not eligible for such a double recovery, since the Jones Act covers seamen, but not longshoremen. The Longshore & Harbor Workers' Compensation Act (LHWCA), which covers Garris, does not provided for a wrongful death cause of action against a subcontractor. Hence, there is no risk that Appellant might recover twice, unless one construes funeral benefits from an employer and wrongful death benefits from a third-party subcontractor to be a double recovery.

> action, as stated in the Court's opinion, is "for death caused by violation of maritime duties." . . . *See* . . . *Kermarec*, 358 U.S. at 630, 79 S.Ct. at 409-410 (negligence). *See also* G. Gilmore & C. Black, *The Law of Admiralty* 368 (2d ed. 1975).

Id. at 214 n.11. This footnote is a crucial clue for at least two reasons. First, the Court emphasized that the *Moragne* cause of action covered something in addition to unseaworthiness causes of action, and the citation to *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630 (1959), makes it rather clear that negligence causes of action for wrongful death were part of that "something" encompassed by the broader language "violation of maritime duties." *See* Steven F. Friedell, *Searching for a Compass: Federal and State Law Making Authority in Admiralty*, 57 La. L. Rev. 825, 835 (1997) ("[T]he holding in *Moragne* was not limited to unseaworthiness. The Court held that 'an action does lie under general maritime law for death caused by violation of maritime duties.' As recognized by the *Yamaha* Court, this encompasses not only unseaworthiness but also products liability and negligence.").

Second, and perhaps even more importantly, the Supreme Court cited favorably to the aforementioned page 368 of the Gilmore and Black treatise, where the authors concluded that the *Moragne* remedy "provides recovery for deaths caused by negligence as well as for deaths caused by unseaworthiness." Gilmore & Black, *supra*, at 368. This citation, combined with the text of footnote 11 and the citation to *Kermarec*, make it clear that the *Yamaha* Court understood *Moragne*'s remedy as encompassing claims like

Appellant's. Although footnote 11 is dicta, it deserves special solace from this Court because it clarifies the Supreme Court's understanding of one of its own opinions. *See United States v. City of Hialeah*, 140 F.3d 968, 974 (11th Cir. 1998) ("Even though that statement by the Supreme Court in *Local 93* was dictum, it is of considerable persuasive value, especially because it interprets the Court's own precedent.").

III.

Ultimately, the agreement between my view and the majority's is far more important than our points of contention. It goes without saying that Appellant has a cause of action under either reading of *Moragne*. I write separately to emphasize that in my view Appellant's cause of action is not a new ship that has suddenly appeared on the horizon. Rather, Appellant's cause of action has been lurking just under the surface for quite some time. For the foregoing reasons, I concur in the judgment.

APPENDIX G — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JUNE 1, 2000

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-2368
(CA-98-382-2)

CELESTINE GARRIS, Administratrix of the Estate of Christopher Garris, deceased,

Plaintiff – Appellant,

versus

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION,

Defendant – Appellee,

and

E.T. GRESHAM, INCORPORATED,

Defendant.

ON PETITION FOR REHEARING EN BANC

Appellees filed a petition for rehearing en banc.

A member of the Court requested a poll on the petition for rehearing en banc. The poll failed to produce a majority

of judges in active service in favor of rehearing en banc. Judges Widener and Niemeyer voted to rehear the case en banc. Chief Judge Wilkinson and Judges Murnaghan, Wilkins, Luttig, Williams, Michael, Motz, Traxler, and King voted against rehearing en banc.

The Court denies the petition for rehearing en banc.

Entered at the direction of Judge Williams for the Court.

For the Court

/s/ Patricia S. Connor
Clerk

APPENDIX H — DISSENTING OPINION OF JUDGE WIDENER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT TO THE ORDER DENYING PETITION FOR REHEARING DATED AND FILED JUNE 2, 2000

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-2368
(CA-98-382-2)

CELESTINE GARRIS, Administratrix of the Estate of Christopher Garris, deceased,

Plaintiff – Appellant,

versus

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION,

Defendant – Appellee,

and

E.T. GRESHAM, INCORPORATED,

Defendant.

ON PETITION FOR REHEARING EN BANC

Appendix H

WIDENER, Circuit Judge, dissenting:

I respectfully dissent to the denial of rehearing en banc in this case. I would grant rehearing en banc in this case of first impression.

The panel opinion relies almost exclusively on the opinion in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). In *Moragne*, the Court addressed discrepancies "between the remedies for deaths covered by the Death on the High Seas Act and for deaths that happen to fall within a state wrongful death statute not encompassing unseaworthiness . . . ." 398 U.S. at 399. Finding that Congress could not have foreseen these discrepancies, the Court concluded that the Death on the High Seas Act did not foreclose any nonstatutory federal remedies that would effectuate the policies of general maritime law. *Moragne*, 398 U.S. at 399-400.

With respect to longshoremen and other harbor workers, the *Moragne* Court found that a claim for wrongful death based upon the unseaworthiness of a vessel was viable because the unseaworthiness doctrine had been extended to longshoremen as the principal vehicle for recovery of injury or death while performing work on a vessel, *Moragne*, 398 U.S. at 399, on the authority of *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946). *Sieracki* extended to land-based stevedores the right given by maritime law to seamen to recover against the ship owner, without the need of proving negligence, for injuries caused by the unseaworthiness of the vessel. Following *Sieracki*, courts made awards to longshoremen on the basis of unseaworthiness. And, as noted, the *Moragne* Court specifically relied on the *Sieracki*

decision to extend the coverage of a wrongful death cause of action based on unseaworthiness to a longshoreman.

In 1972, Congress enacted various amendments to the Longshore and Harbor Workers' Compensation Act. As part of these amendments, Congress added 33 U.S.C. § 905(b), which specifically eliminates the right of longshoremen and harbor workers to recover against the vessel on the basis of unseaworthiness. See *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 165 (1981) (longshoreman's right to recover for unseaworthiness abolished); Herbert R. Baer, *Admiralty Law of the Supreme Court* § 6-17 at 90-91 (2d ed. Supp. 1977). The legislative history mentions *Sieracki* by name and rejects the holding of that case to the extent that it created an absolute duty of seaworthiness to "longshoreman and others who performed work on the vessel." H.R. Robert E. Payne. No. 92-1441 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4698, 4702. Thus, because *Moragne* relies on *Sieracki* to extend a wrongful death action based on unseaworthiness to longshoremen and harbor workers, to the extent of that reliance *Moragne* was superceded and reversed by the 1972 amendments to the act. Thus, the panel opinion's reliance on this portion of *Moragne* is misplaced.

The legislative history of the 1972 amendments to the Act are particularly relevant to our decision in this case. It is clear from this history that Congress intended to "place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial

nomenclature it may be called, such as 'unseaworthiness', non-delegable duty', or the like." 1972 U.S.C.C.A.N 4698, 4703.[1]

In spite of this explicit expression of Congressional intent, the panel opinion creates a new cause of action which is exactly the opposite of that which Congress intended. First, the decision creates a "special maritime theory of liability" — one for wrongful death based on negligence. Second, the decision gives an employee injured aboard a vessel a cause of action that a Virginia worker on shore would not have.

In a case such as this in which Congress has made its intention explicit, I suggest it is beyond our warrant to substitute our notions of public policy for that of Congress. *Local 1976, United Bhd. of Carpenters and Joiners v. N.L.R.B.*, 357 U.S. 93, 100 (1958) ("[I]t is the business of Congress to declare policy and not this Court's. The judicial function is confined to applying what Congress has enacted after ascertaining what it is that Congress has enacted."). "Whether the federal policy is a wise one is for the Congress and the Chief Executive to determine. Once they have spoken, it is our function to enforce their will." *United States v. Georgia Pub. Serv. Comm'n*, 371 U.S. 285, 293 (1963).

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1. As *Scindia* points out both the Senate and House Committee Reports agree on this language. *Scindia*, 451 U.S. at 165-166 n.13.

APPENDIX I — RELEVANT STATUTES

The Longshore and Harbor Workers Compensation Act, 33 U.S.C.A. §§ 903(a), 904, 905(a)-(b), 909 (West 1986).

§ 903. Coverage.

(a) Disability or death; injuries occurring upon navigable waters of United States. Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

§ 904. Liability for compensation.

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor.

(b) Compensation shall be payable irrespective of fault as a cause for the injury.

Appendix 1

§ 905. Exclusiveness of liability.

(a) Employer liability; failure of employer to secure payment of compensation. The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

(b) Negligence of vessel. In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary

shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

§ 909. Compensation for death.

If the injury causes death, the compensation therefore shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

(a) Reasonable funeral expenses not exceeding $3,000.

(b) If there be a widow or widower and no child of the deceased, to such widow or widower 50 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of 16 2/3 per centum of such wages for each such child; in case of the

death or remarriage of such widow or widower, if there be one surviving child of the deceased employee, such child shall have his compensation increased to 50 per centum of such wages, and if there be more than one surviving child of the deceased employee, to such children, in equal parts, 50 per centum of such wages increased by 16 2/3 per centum of such wages for each child in excess of one: Provided, That the total amount payable shall in no case exceed 66 2/3 per centum of such wages. The deputy commissioner having jurisdiction over the claim may, in his discretion, require the appointment of a guardian for the purpose of receiving the compensation of a minor child. In the absence of such a requirement the appointment of a guardian for such purposes shall not be necessary.

(c) If there be one surviving child of the deceased, but no widow or widower, then for the support of such child 50 per centum of the wages of the deceased; and if there be more than one surviving child of the deceased, but no widow or dependent husband, then for the support of such children, in equal parts 50 per centum of such wages increased by 16 2/3 per centum of such wages for each child in excess of one: Provided, That the total amount payable shall in no case exceed 66 2/3 per centum of such wages.

(d) If there be no surviving wife or husband or child, or if the amount payable to a surviving wife or husband and to children shall be less in the aggregate than 66 2/3 per centum of the average wages of the deceased; then for the support of grandchildren or brothers and sisters, if dependent upon the deceased at the time of the injury, and any other persons who satisfy the definition of the term "dependent" in section

152 of Title 26, but are not otherwise eligible under this section, 20 per centum of such wages for the support of each such person during such dependency and for the support of each parent, or grandparent, of the deceased if dependent upon him at the time of the injury, 25 per centum of such wages during such dependency. But in no case shall the aggregate amount payable under this subdivision exceed the difference between 66 2/3 per centum of such wages and the amount payable as hereinbefore provided to widow or widower and for the support of surviving child or children.

(e) In computing death benefits, the average weekly wages of the deceased shall not be less than the national average weekly wage as prescribed in section 906(b) of this title, but —

> (1) the total weekly benefits shall not exceed the lesser of the average weekly wages of the deceased or the benefit which the deceased employee would have been eligible to receive under section 906(b)(1) of this title; and
>
> (2) in the case of a claim based on death due to an occupational disease for which the time of injury (as determined under section 910(i) of this title) occurs after the employee has retired, the total weekly benefits shall not exceed one fifty-second part of the employee's average annual earnings during the 52-week period preceding retirement.

(f) All questions of dependency shall be determined as of the time of the injury.

Appendix 1

The Virginia Workers' Compensation Act, Va. Code Ann. §§ 65.2-302, -307, -512, -515, -516 (Michie 1995 & Supp. 1999).

§ 65.2-302. Statutory employer.

A. When any person (referred to in this section as "owner") undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (referred to in this section as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any worker employed in the work any compensation under this title which he would have been liable to pay if the worker had been immediately employed by him.

B. When any person (referred to in this section as "contractor") contracts to perform or execute any work for another person which work or undertaking is not a part of the trade, business or occupation of such other person and contracts with any other person (referred to in this section as "subcontractor") for the execution or performance by or under the subcontractor of the whole or any part of the work undertaken by such contractor, then the contractor shall be liable to pay to any worker employed in the work any compensation under this title which he would have been liable to pay if that worker had been immediately employed by him.

C. When the subcontractor in turn contracts with still another person (also referred to as "subcontractor") for the

performance or execution by or under such last subcontractor of the whole or any part of the work undertaken by the first subcontractor, then the liability of the owner or contractor shall be the same as the liability imposed by subsections A and B of this section.

§ 65.2-307. Employee's rights under Act exclude all others.

A. The rights and remedies herein granted to an employee when his employer and he have accepted the provisions of this title respectively to pay and accept compensation on account of injury or death by accident shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, at common law or otherwise, on account of such injury, loss of service or death.

B. Notwithstanding this exclusion, nothing in the Act shall bar an employer from voluntarily agreeing to pay an employee compensation above and beyond those benefits provided for in the Act. Nothing herein, however, shall be deemed to affect or alter any existing right or remedy of the employer or employee under the Act.

§ 65.2-512. Compensation to dependents of an employee killed; burial expenses.

A. If death results from the accident within nine years, the employer shall pay, or cause to be paid, compensation in weekly payments equal to 66 2/3 percent of the employee's average weekly wages, but not more than 100 percent of the

average weekly wage of the Commonwealth as defined in § 65.2-500 nor less than 25 percent of the average weekly wage as defined therein:

1. To those persons presumed to be wholly dependent upon the deceased employee as set forth in subdivisions A 1, A 2, and A 3 of § 65.2-515, for a period of 500 weeks from the date of injury; or

2. If there are no total dependents pursuant to subdivision A 1, A 2, or A 3 of § 65.2-515, to those persons presumed to be wholly dependent as set forth in subdivision A 4 of § 65.2-515, and to those determined to be wholly dependent in fact, for a period of 400 weeks from the date of injury; or

3. If there are no total dependents, to partial dependents in fact, for a period of 400 weeks from the date of injury.

B. The employer shall also pay burial expenses not exceeding $10,000 and reasonable transportation expenses for the deceased not exceeding $1,000.

C. Benefits shall be divided equally among total dependents, to the exclusion of partial dependents. If there are no total dependents, benefits shall be divided among partial dependents according to the dependency of each upon the earnings of the employee at the time of the injury, in the proportion that partial dependency bears to total dependency.

D. If benefits are terminated as to any member of a class herein, that member's share shall be divided among the remaining members of the class proportionately according to their dependency.

E. When weekly payments have been made to an injured employee before his death, the compensation to dependents shall begin from the date of the last of such payments but shall not continue for a period longer than specified in subsection A of this section.

§ 65.2-515. Persons conclusively presumed to be wholly dependent.

A. The following persons shall be conclusively presumed to be dependents wholly dependent for support upon the deceased employee:

1. A wife upon a husband whom she had not voluntarily deserted or abandoned at the time of the accident or with whom she lived at the time of his accident, if she is then actually dependent upon him;

2. A husband upon a wife whom he had not voluntarily deserted at the time of the accident or with whom he lived at the time of her accident, if he is then actually dependent upon her;

3. A child under the age of eighteen upon a parent and a child over such age if physically or mentally incapacitated from earning a livelihood

or a child under the age of twenty-three if enrolled as a full-time student in any accredited educational institution; and

4. Parents in destitute circumstances, provided there be no total dependents pursuant to other provisions of this section.

B. As used in this section, the term "child" shall include a stepchild, a legally adopted child, a posthumous child, and an acknowledged illegitimate child, but shall not include a married child; and the term "parent" shall include stepparents and parents by adoption.

§ 65.2-516. Other cases of dependency.

In all other cases questions of dependency in whole or in part shall be determined in accordance with the facts as the facts are at the time of the accident; but no allowance shall be made for any payment made in lieu of board and lodging or services and no compensation shall be allowed unless the dependency existed for a period of three months or more prior to the accident.

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JAN 25 2001
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JAN 25 2001

No. 00-346

IN THE

Supreme Court of the United States

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION,

Petitioner,

v.

CELESTINE GARRIS, ADMINISTRATRIX OF THE ESTATE OF CHRISTOPHER GARRIS, DECEASED,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the Fourth Circuit erred in extending *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), a case which was superseded and reversed by Congress in 1972, to create a new judge-made general maritime law wrongful death cause of action in negligence for the accidental death of a non-seaman in state territorial waters?

PARTIES TO THE PROCEEDING

All parties to the proceeding below are identified in the caption of this case except E. T. Gresham, Inc. ("Gresham"). Gresham was originally named as a co-defendant in this action and participated in the proceedings before the United States Court of Appeals for the Fourth Circuit. Upon motion of Celestine Garris, the Court of Appeals entered an order dismissing Gresham from this action, with prejudice, on May 1, 2000. (App. 6a)

CORPORATE DISCLOSURE STATEMENT

The parent company of the petitioner, Norfolk Shipbuilding & Drydock Corporation ("Norshipco"), is United States Marine Repair, Inc. No publicly held company owns 10 percent or more of Norshipco stock.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit appears at Appendix F (21a-49a), and is reported at 210 F.3d 209 (4th Cir. 2000).

The opinion of The Honorable Cynthia Holcomb Hall, United States Circuit Court Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation and concurring in the judgment of the Fourth Circuit, appears at Appendix F (50a-61a), and is reported at 210 F.3d 209, 222 (4th Cir. 2000).

The opinion of The Honorable H. Emory Widener, Jr., dissenting to the Fourth Circuit's denial of Norshipco's petition for rehearing en banc appears at Appendix H (64a-67a).

The opinion of the United States District Court for the Eastern District of Virginia appears at Appendix E (13a-21a), and is reported at 1999 A.M.C. 769 (E.D. Va. 1998).

STATEMENT OF JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fourth Circuit were entered on April 3, 2000. (App. 21a) Norshipco timely filed a petition for rehearing en banc on April 17, 2000 (App. 6a), which the Court of Appeals denied by order entered June 1, 2000. (App. 62a-63a) Norshipco timely filed a petition for a writ of certiorari on August 30, 2000. (App. 7a) This Court granted Norshipco's petition by order entered December 11, 2000. (App. 7a) Jurisdiction exists pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following constitutional and statutory provisions are pertinent in assessing whether the Fourth Circuit erred in creating a new, judge-made general maritime law wrongful death cause of action in negligence for the accidental death of a non-seaman in state territorial waters.

United States Constitution, Article III, Section 2, clause 1:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all cases affecting Ambassadors, other public Ministers and Consuls, to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The Death on the High Seas Act, 46 U.S.C.A. §§ 761, 767 (West 1975):

> **§ 761. Right of action; where and by whom brought**
>
> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of

the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

§ 767. Exceptions from operation of chapter

The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.

The Jones Act, 46 U.S.C.A. App. § 688(a) (West Supp. 2000):

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be

> under the court of the district in which the defendant employer resides or in which his principal office is located.

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C.A. §§ 903(a), 904, 905(a)-(b), 909 (West 1986), *reprinted at* App. I (68a-72a).

The Virginia Wrongful Death Act, Va. Code Ann. § 8.01-50(A) (Michie 1992):

> Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, or of any ship or vessel, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action, or to proceed in rem against such ship or vessel or in personam against the owners thereof or those having control of her, and to recover damages in respect thereof, then, and in every such case, the person who, or corporation or ship or vessel which, would have been liable, if death had not ensued, shall be liable to an action for damages, or, if a ship or vessel, to a libel in rem, and her owners or those responsible for her acts or defaults or negligence to a libel in personam, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances, as amount in law to a felony.

The Virginia Workers' Compensation Act, Va. Code Ann. §§ 65.2-302, -307, -512, -515, -516 (Michie 1995 & Supp. 1999), *reprinted at* App. I (73a-77a).

STATEMENT OF THE CASE

The Incident

On April 8, 1997, harbor worker Christopher Garris suffered fatal injuries while working aboard the *USNS Maj. Stephen W. Pless* (the "vessel"). (App. 9a) At the time of the incident, the vessel was docked in navigable waters at Norshipco's facility in Norfolk, Virginia. (App. 9a, 22a) Norshipco, a ship repair company, had contracted to perform certain work on the vessel. (App. 9a) Christopher Garris was employed by Tidewater Temps, Inc. to perform sandblasting work for Mid-Atlantic Coatings, Inc., a subcontractor of Norshipco. (App. 9a, 22a) Another subcontractor, E.T. Gresham, Inc., was operating a crane alongside the vessel. (App. 9a, 22a) The Gresham crane operator allegedly accidentally caused Garris to fall off a 30-foot high reserve hopper used to store sand for sandblasting on the vessel. (App. 14a, 22a) Christopher Garris died as a result of the fall. (App. 14a-15a, 22a)

Plaintiff Pursues State And Federal Remedies

Christopher Garris's mother, Celestine Garris ("Garris" or "plaintiff"), collected statutory death benefits from Tidewater Temps, Inc. under the Longshore and Harbor Workers' Compensation Act ("LHWCA"). (App. 20a) In addition to her LHWCA recovery, Garris initially filed suit against Norshipco and Gresham in Virginia state court but nonsuited that action following the filing of a demurrer and other motions by defendants.[1] (App. 15a)

---

1. Virginia law recognizes a state wrongful death claim but holds that no general maritime cause of action exists for the negligent death of a non-seaman in state territorial waters. *Brown v. Brown*, 226 Va. 320, 327, 309 S.E. 2d 586, 590 (Va. 1983), *cert. denied*, 467 U.S. 1242 (1984). (App. 15a)

Shortly thereafter, Garris filed a civil action against Norshipco and Gresham in the United States District Court for the Eastern District of Virginia asserting a purported general maritime law wrongful death claim for negligence and a state law negligence claim under the Virginia Wrongful Death Act. (App. 8a-10a) Garris demanded "damages pursuant to the general maritime law for funeral expenses, pain and suffering of the decedent prior to his death, loss of society and loss of services" and "damages pursuant to the Virginia Wrongful Death Act, § 8.01-52." (App. 10a) Garris's complaint alleged that the district court had jurisdiction pursuant to 28 U.S.C. § 1333. (App. 9a)

The District Court Dismissal: No Federal Cause Of Action Under *Moragne* Or General Maritime Law

Norshipco and Gresham moved to dismiss both of plaintiff's claims. (App.11a-12a, 13a) The district court dismissed the federal maritime claim with prejudice, holding that *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), did not create a cause of action for the death of a non-seaman in state territorial waters resulting from negligence and that no such cause of action exists under general maritime law. (App. 13a-20a) The district court declined to exercise supplemental jurisdiction over Garris's state wrongful death claim and dismissed that claim without prejudice. (App. 20a)

The Fourth Circuit Agrees *Moragne* Does Not Provide A Remedy For Garris

Garris appealed to the United States Court of Appeals for the Fourth Circuit. A three-judge panel heard the appeal. (App. 21a) In the majority opinion, two judges "agree[d] with the district court and conclude[d] that *Moragne* did not recognize a general maritime law cause of action for wrongful

death based upon negligence." (App. 40a) *Moragne*, the two-judge panel decision held, "was, both at its heart and in its facts, an unseaworthiness case." (*Id.*)[2]

A Result-Oriented Decision

The Fourth Circuit majority found that Garris was not entitled to recover tort damages against Norshipco under the existing federal and state statutory schemes given her son's status as a land-based harbor worker (rather than a seaman) and the situs of his death within Virginia state territorial waters:

> In the present case, Garris has no right of recovery under the existing statutory scheme. Garris cannot recover under DOHSA because her son died within state territorial waters. She cannot recover under the Jones Act because her son was a harbor worker, and not a seaman. And, she apparently cannot recover against Norfolk under the Virginia wrongful-death statute because the Virginia worker's compensation statute confers broader immunity than the LHWCA; unlike the LHWCA, which bars suit only against the immediate employer . . . the Virginia statute bars state tort claims against contractors as well as immediate employers. . . . *See* Va. Code Ann. §§ 65.2-302, 307 (Michie Supp. 1999); *Ward v. Norfolk Shipbuilding & Drydock Corp.*, 770 F. Supp. 1118, 1120 (E.D. Va. 1991). . . . (App. 43a-44a; footnotes omitted)

The panel thus looked to general maritime law for a tort remedy, noting that Garris would not be able to recover

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2. The third member of the panel wrote a concurring opinion agreeing with the majority's judgment but arguing that "*Moragne* itself created a cause of action for negligence-based wrongful death." (App. 50a-61a) (Hall, J., concurring)

damages from Norshipco "absent a federal maritime law cause of action for wrongful death based upon negligence." (App. 45a) After concluding that *Moragne* did not provide the desired remedy (App. 40a), the majority voiced its subjective belief that tort recovery should not be denied based upon the "happenstance" facts of the decedent's occupational status and situs of injury[3] and proceeded to extend *Moragne* to create a new general maritime wrongful death cause of action for Garris to assert against Norshipco:

> Because such a cause of action is consistent with the framework set forth in *Moragne*, we hold that a general maritime law cause of action against third parties for wrongful death based upon negligence is available where a harbor worker, such as Garris's son, dies within state territorial waters. (App. 47a-48a)

The court offered two reasons for its result-oriented ruling: absence of a federal statute expressly excluding a negligence-based action and furtherance of *Moragne*'s uniformity principle. (App. 49a)

Dissent From Denial Of Rehearing En Banc

Norshipco timely filed a petition for rehearing en banc. (App. 62a) Although Norshipco failed to obtain a majority vote in favor of rehearing, Judges Widener and Niemeyer did vote for rehearing. (App. 62a-63a)

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3. The court stated:

> We see no reason to deny Garris a basis of recovery simply because her son was a harbor worker who died in Virginia, as opposed to another state that permits recovery against contractors. . . . The location of a harbor worker's death — a fact of true happenstance — should not determine an injured party's ability to recover for wrongful death. (App. 45a-47a)

Judge Widener wrote a dissenting opinion to the denial of rehearing en banc. (App. 64a-67a) In his dissent, Judge Widener argued that the panel's reliance upon *Moragne* is misplaced because the 1972 amendments to the LHWCA effectively "superseded and reversed" *Moragne* (App. 66a) and that "the panel opinion creates a new cause of action which is exactly the opposite of that which Congress intended" when it passed the 1972 amendments to the LHWCA. (App. 67a)

SUMMARY OF ARGUMENT

Neither the relevant acts of Congress (DOHSA, the Jones Act and the LHWCA) nor this Court's decision in *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), provides a negligence-based wrongful death cause of action for non-seamen killed in state territorial waters. Land-based persons, including harbor workers such as Garris's decedent, are instead covered by state wrongful death law, in this case the Virginia Wrongful Death Act, Va. Code Ann. § 8.01-50 *et seq*. (Michie 1992). In accordance with the principles of federalism, a court exercising admiralty jurisdiction over a wrongful death claim involving a land-based worker must identify and enforce the limits of the applicable state wrongful death law to the claim before it. *Hess v. United States*, 361 U.S. 314, 320 (1960) (The power of a State to create a right of action for death "includes of necessity the power to determine when recovery shall be permitted and when it shall not."); *The Tungus v. Skovgaard*, 358 U.S. 588, 592 (1959) ("... when admiralty adopts a State's right of action for wrongful death, it must enforce the right as an integrated whole, with whatever conditions and limitations the creating State has attached"); *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921). The Fourth Circuit should not have disregarded the pronouncements of Congress and this Court in order to create a new general maritime remedy for Garris's benefit. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990)

(". . . we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them").

The Fourth Circuit accordingly erred in extending *Moragne* to create a general maritime cause of action for the negligence-based wrongful death of a non-seaman in state territorial waters. The court's new remedy — fashioned solely to circumvent the anticipated application of Virginia's statutory employer law immunizing Norshipco from tort liability to Garris under the Virginia Wrongful Death Act — contravenes Congress's express intent to reserve the provision of remedies for the wrongful death of a non-seaman occurring in state territorial waters to the States and impermissibly intrudes upon the States' powers to protect their citizens by delineating remedies for tortious conduct causing death within state borders. This new remedy cannot be justified on professed "uniformity" grounds as the wrongful death of a harbor worker occurring in state territorial waters is maritime and local in character (*Western Fuel Co. v. Garcia*, 257 U.S. 233, 242 (1921)) and the general maritime law has never viewed the subject matter of negligence-based wrongful death remedies as being one of its "characteristic features" or the provision of state remedies as "interfering with the proper harmony and uniformity of that law in its international or interstate relations." *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917); *American Dredging Co. v. Miller*, 510 U.S. 443, 447 (1994). The Fourth Circuit's ruling must accordingly be reversed.

ARGUMENT

The Fourth Circuit Erred In Extending *Moragne* To Create A New General Maritime Law Cause Of Action For The Negligence-Based Wrongful Death Of A Non-Seaman In State Territorial Waters.

Because Garris's son died while working on a ship docked in navigable waters (App. 9a), her wrongful death claim falls within the court's admiralty jurisdiction. *Yamaha Motor Corp., U.S.A v. Calhoun*, 516 U.S. 199, 206 (1996). "With admiralty jurisdiction comes the application of substantive admiralty law." *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864 (1986). Substantive admiralty law includes both federal legislation (*In re Garnett*, 141 U.S. 1, 12 (1891)) and judge-made general maritime law. *The Lottawanna*, 88 U.S. 558 (1875). Neither affords Garris the remedy created by the Fourth Circuit in this case.

I. The Fourth Circuit's Newly-Declared Cause Of Action Is Not Found In Federal Statutory Or General Maritime Law.

A. Congress Has Declined To Provide A Remedy For The Wrongful Death Of A Non-Seaman In State Territorial Waters, Expressly Leaving This Subject Matter To The States.

Congress has enacted a number of statutes governing maritime rights and remedies pursuant to its powers under the Admiralty and Commerce clauses of the Constitution. 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law*, § 4-1 at 147-148 (3d ed. 2001). Where such legislation exists, the courts must primarily look to it in resolving questions concerning the availability of remedies under the general

maritime law. The primacy of federal maritime legislation in determining remedies was succinctly stated in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990):

> We no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection from injury and death; Congress and the States have legislated extensively in these areas. In this era, an admiralty court should look primarily to those legislative enactments for policy guidance. We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation. (*Id.* at 27)

Three federal statutes grant remedies for wrongful death occurring in navigable waters: the Jones Act, 46 U.S.C.A. App. § 688(a) (West Supp. 2000); the Death on the High Seas Act ("DOHSA"), 46 U.S.C.A. § 761 (West 1975); and the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C.A. § 901 (West 1986). Significantly, none of these statutes, which delineate remedies based upon occupational status and/or situs of death (the same factors which the Fourth Circuit deemed immaterial "happenstance" below)[4], provides a cause of action for the negligence-based, wrongful death of a non-seaman in state territorial waters.

The Jones Act grants the personal representative of a seaman killed in the course of employment a wrongful death remedy against the seaman's employer. 46 U.S.C.A. App. § 688(a). Christopher Garris was a "land-based," temporary

4. App. 45a-47a.

employee of a ship repair company (App. 14a) and thus did not possess seaman status under the Jones Act. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368 (1995). Absent seaman status, no cause of action exists under the Jones Act. *Id.* at 355.

As a sandblaster working on a vessel docked in navigable waters, Christopher Garris was a harbor worker covered by the LHWCA. 33 U.S.C.A. § 902(3) (West 1986). This statute provides a workers' compensation death remedy against the "employer," 33 U.S.C.A. §§ 902(4), 909, and a negligence-based cause of action against "the vessel." 33 U.S.C.A. § 905(b). The LHWCA does not afford a negligence-based, wrongful death claim for Garris to assert against Norshipco.

DOHSA provides a wrongful death cause of action uniformly applicable to all classes of people. DOHSA, however, applies only when death is caused by a wrongful act "occurring on the high seas beyond a marine league from the shore of any State. . . ." 46 U.S.C.A. § 761. Congress notably left intact the state wrongful death remedies available for deaths in state territorial waters. *See* 46 U.S.C.A. § 767; *Miles v. Apex Marine Corp.*, 498 U.S. 19, 25 (1990). Because Garris alleges that Norshipco caused her son's death aboard a vessel berthed at Norshipco's facility in Virginia state territorial waters, she cannot assert a claim under DOHSA. (App. 9a)

B. General Maritime Law Does Not Provide A Negligence-Based Cause Of Action For Wrongful Death Occurring Within State Territorial Waters.

1. Maritime Law Has Long Relied On State Wrongful Death Acts To Supply A Negligence-Based Wrongful Death Remedy Unavailable Under Federal Common Law.

Actions for death occurring on navigable waters have a unique history quite different from personal injury actions.

While affording a remedy for those injured on navigable waters, maritime law originally followed the common law rule whereby a tort action died with the injured party. The Court accordingly held in *The Harrisburg*, 119 U.S. 199 (1886), *overruled in part*, 398 U.S. 375 (1970), that absent a statute giving the right, no wrongful death cause of action would lie in the courts of the United States under the general maritime law. *Id.* at 213-214.

Following *The Harrisburg*, admiralty courts began applying state wrongful death acts to permit recovery for deaths in state territorial waters. *See Moragne*, 398 U.S. at 393 ("For deaths within state territorial waters, the federal law accommodated the humane policies of state wrongful-death statutes by allowing recovery whenever an applicable state statute favored such recovery.").[5]

In *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921), the Court specifically approved the application of state wrongful death statutes based upon the "maritime and local" nature of a death occurring in state territorial waters as a result of a tort committed within the state:

> . . . we think it follows that where death upon such waters follows from a maritime tort committed on navigable waters within a state whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel in personam for the damages sustained by those to whom such right is given. The subject is maritime and local in character, and the specified modification of or supplement to the rule applied in admiralty courts when following the common

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5. State statutes were also occasionally deemed to permit recovery for death on the high seas prior to the enactment of DOHSA in 1920. *See, e.g. The Hamilton*, 207 U.S. 398 (1907) (Delaware wrongful death statute applied to collision on high seas of two vessels owned by Delaware corporations).

> law will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations. (*Id.* at 242)

Subsequent Supreme Court decisions uniformly upheld the application of state wrongful death acts for non-seamen killed in state territorial waters. *See, e.g. The Tungus v. Skovgaard*, 358 U.S. 588 (1959) (right to recover for death of non-seaman in state territorial waters depends entirely upon the state's wrongful death statute); *Hess v. United States*, 361 U.S. 314 (1960) (action for wrongful death in state territorial waters governed by state statute).

In 1970, the Court overruled *The Harrisburg*, 119 U.S. 199 (1886), holding in *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), that an action for wrongful death based on unseaworthiness is maintainable under federal maritime law. The Court has since reaffirmed the continuing application of state law remedies for negligence-based wrongful death. *Yamaha v. Calhoun*, 516 U.S. 199 (1996) (state law wrongful death remedies applied to jet skier killed in state territorial waters).

2. *Moragne* Did Not Create A New General Maritime Cause Of Action For Negligence-Based Wrongful Death, But In Fact Confirms The Application Of State Law Remedies For Negligent Death In State Territorial Waters.

a. *Moragne* Addressed Unseaworthiness Only

The Fourth Circuit correctly concluded that *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), "was, both at its heart and in its facts, an unseaworthiness case." *Garris*, 210 F.3d at 219 (App. 40a); *see Yamaha*, 516 U.S. at 209; *Ford v. Wooten*, 681 F.2d 712, 715 (11th Cir. 1982), *cert. denied*,

459 U.S. 1202 (1983); *Ivy v. Security Barge Lines, Inc.*, 606 F.2d 524, 527 (5th Cir. 1979), *cert. denied*, 446 U.S. 956 (1980); *Brown*, 309 S.E.2d at 590, and thus did not create a general maritime remedy for negligence-based wrongful death.

A brief review of *Moragne* confirms the point. *Moragne* involved the death of a longshoreman in Florida territorial waters. *Moragne*, 398 U.S. at 376. The decedent's widow ("Moragne") filed a wrongful death action in Florida state court alleging state law negligence and unseaworthiness of the vessel. *Id.* Defendant removed the case to federal court and obtained dismissal of the unseaworthiness claim on the grounds that the Florida wrongful death statute "did not encompass unseaworthiness as a basis of liability" and the general maritime law did not recognize such a claim. *Id.* at 377. Moragne's negligence claim under the Florida wrongful death statute remained pending and thus was not before the Court on appeal. The only issue for decision was whether the general maritime law should be deemed to afford a wrongful death cause of action based upon the uniquely maritime concept of unseaworthiness. *Id.*

The Court answered "yes", overruling *The Harrisburg* and holding that an action does lie under maritime law for death caused by violation of maritime duties. *Id.* at 409. That *Moragne*'s holding is directed to "unseaworthiness" only is plain: unseaworthiness was the only issue before the Court and the Court's analysis focused on (1) the unforeseen development of unseaworthiness as a primary means of recovery under admiralty law[6] (and its absence from many

6. Between *The Harrisburg* decision in the late 1800's and the *Moragne* decision in 1970, the Court had "transform[ed] the shipowner's duty to provide a seaworthy ship into an absolute duty not satisfied by due diligence." *Moragne*, 398 U.S. at 399. The Court in *Seas Shipping Co., Inc. v. Sieracki*, 328 U.S. 85 (1946), extended the warranty of seaworthiness to longshoremen "performing the (Cont'd)

state wrongful death statutes); and (2) the three seaworthiness-related "anomalies" that would be perpetuated if Congress was deemed to have intended DOHSA and the Jones Act to preclude such recovery. Following this analysis, the Court concluded that recognition of unseaworthiness as a general maritime law wrongful death cause of action would further Congress's stated purpose of "uniformity in the exercise of admiralty jurisdiction" when it enacted the Jones Act. *Id.* at 401.[7]

Moragne thus acted as a gap-filler in the existing remedial scheme, ensuring uniform rather than ad hoc availability of an unseaworthiness remedy in all fifty states. *Yamaha*, 516 U.S. at 217 ("The *Moragne* cause of action was in many respects a gap-filling measure to ensure that seamen (and their survivors) would all be treated alike.") (citing *Calhoun v. Yamaha Motor Corp., U.S.A.*, 40 F.3d at 641-642).

(Cont'd)
ship's service." 328 U.S. at 97. The unseaworthiness doctrine, therefore, created "a strict liability obligation" running from shipowners to seamen and (at that time) longshoremen. *Miles*, 498 U.S. at 25. After *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944), and *Sieracki*, the easily met unseaworthiness standard became the "principal vehicle for recovery" in maritime tort cases against shipowners, completely "overshadowing" negligence. *Moragne*, 398 U.S. at 399; *see Yamaha*, 516 U.S. at 208 (unseaworthiness "eclipsed ordinary negligence as the primary basis of recovery").

7. The 1972 amendments to the LHWCA reversed *Sieracki* and *Moragne* by abrogating vessel liability to longshoremen based on unseaworthiness. *See* 33 U.S.C.A. § 905(b) (West 1986). Thus, only two years after the Court fashioned an unseaworthiness remedy for the longshoreman's widow in *Moragne*, Congress legislatively abrogated the remedy. *See* Dissent of Widener, J., to Order Denying Rehearing En Banc (App. 66a-67a).

b. *Moragne* Left State Law Remedies For Negligence-Based Wrongful Death Intact.

Although not directly at issue in *Moragne,* the Court's opinion demonstrates that the remedy for negligence-based wrongful death is adequately and appropriately provided by state rather than general maritime law. Foremost, as this Court observed in *Yamaha, Moragne* "notably left in place the negligence claim [the widow] had stated under Florida's law." *Yamaha*, 516 U.S. at 214. The Court did not need or seek to create a uniform maritime remedy for negligence-based wrongful death as the Court recognized that "every State today has enacted a wrongful-death statute," thereby affording a negligence-based wrongful death remedy throughout the nation. *Moragne*, 398 U.S. at 390.

Moreover, *Moragne* specifically discussed the significant preemption problem that would inevitably arise if the general maritime law recognized a negligence-based, wrongful death remedy applicable in state territorial waters. The *Moragne* Court carefully explained that when Congress passed DOHSA, it "intended to ensure the continued availability of a remedy, historically provided by the States, for deaths in territorial waters." *Moragne*, 398 U.S. at 397; *see Miles*, 498 U.S. at 25 ("Congress did not extend DOHSA to territorial waters because it believed state statutes sufficient in those areas"); 46 U.S.C.A. § 767 (West 1975) ("the provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter"). "The express provision that state remedies in territorial waters were not disturbed by [DOHSA] ensured that Congress' solution of one problem would not create another by inviting the courts to find that [DOHSA] pre-empted the entire field, destroying the state remedies that had previously existed." *Moragne*, 398 U.S. at 398. *Moragne*'s state law sentiments were recently echoed in *Yamaha v. Calhoun*, 516 U.S. 199 (1996), wherein this Court held that federal

maritime law did not displace state wrongful death law concerning the death of a non-seaman (a twelve year-old jet skier) in state territorial waters.

II. Extending *Moragne* To Create A New, Negligence-Based General Maritime Law Wrongful Death Cause Of Action For A Non-Seaman Contravenes Congress's Considered Judgment To Reserve This Area Of Law To The States.

Although the federal judiciary has the power to announce new principles of general maritime law, this Court has declared that such power is to be exercised sparingly and should conform general maritime law to the legislative will. *Miles v. Apex Marine Corp.*, 498 U.S. at 27-33, 36-37. Here, the legislative will dictates that it is state law, not federal maritime law, that is to govern the provision of a wrongful death remedy for Garris to assert against Norshipco. The Fourth Circuit erred in creating a new maritime remedy in contravention of this clear legislative directive.

A. DOHSA Expressly Reserves To The States The Right To Provide And Regulate Rights Of Action For Negligence-Based Wrongful Death Occurring In State Territorial Waters.

In 1920, Congress altered the maritime law by enacting DOHSA and the Jones Act, both of which provide statutory wrongful death causes of action in certain circumstances. *Miles*, 498 U.S. at 23-24.[8] DOHSA was enacted to furnish a wrongful death remedy applicable to all persons "for deaths beyond the jurisdiction of any State." *Moragne*, 398 U.S. at 393. Section 1 of the Act provides a cause of action "[w]henever the death of a person shall be caused by wrongful

8. The Jones Act provides a right of recovery against employers for the negligent injury/death of seamen that "follows from the seaman's employment status and is not limited to injury or death occurring on the high seas." *Moragne*, 398 U.S. at 394.

act, negligence or default occurring on the high seas beyond a marine league from the shore of any State." 46 U.S.C.A. § 761 (West 1975).

Section 7 of the Act expressly exempts state territorial waters from coverage and preserves state sovereignty over the remedies to be afforded for deaths caused by maritime torts within a State's territorial waters. Section 7 states:

> The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone. (46 U.S.C.A. § 767) (West 1975)

DOHSA's legislative history likewise discloses "a clear congressional purpose to leave 'unimpaired the rights under State statutes as to deaths on waters within the territorial jurisdiction of the States.' " S. Rep. No. 216, 66th Cong., 1st Sess. 3, 4 (1919); H. R. Rep. No. 674, 66th Cong., 2d Sess. 3, 4 (1920); *Moragne*, 358 U.S. at 398. As noted in *Moragne*, Congress sought to ensure the continued availability of a remedy historically provided by the States for deaths in territorial waters and to avoid any possibility of federal preemption of state law remedies in state territorial waters. *Id.* at 398.

The Fourth Circuit's creation of a new general maritime cause of action for negligence-based wrongful death in state territorial waters directly contravenes Congress's considered judgment, plainly expressed in the statutory language and legislative history of DOHSA, to reserve this area of law to the States.

B. The 1972 Amendments To The LHWCA Place Longshoremen And Harbor Workers Such As Garris In The Same Position As Other Land-Based Workers Subject To State Law By Eliminating Special Maritime Causes Of Action.

1. Background Of The LHWCA

In 1927, Congress passed the LHWCA to provide compensation in lieu of tort damages for "longshoremen," land-based workers who perform tasks for, on and around vessels. 1 Schoenbaum, *Admiralty and Maritime Law*, § 7-1 at 380 (3d ed. 2001). The LHWCA, like its state law counterparts, requires employers to pay compensation, without fault, for accidental injuries and deaths arising out of covered workers' employment. In exchange for this compensation without fault, the LHWCA provides a statutory scheme of benefits which are sometimes less than tort damages and grants the employer immunity from tort liability irrespective of fault. *Id.* at 381. The LHWCA was originally enacted to cover workers who were excluded from state law workers' compensation coverage due to the maritime character of their employment. *See Southern Pacific v. Jensen*, 244 U.S. 205 (1917). More recent decisions of this Court recognize an area of concurrent jurisdiction between the LHWCA and state workers' compensation laws. *See Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980); *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962).[9]

2. The 1972 Amendments Abrogate *Moragne*

In 1972, Congress enacted various amendments to the LHWCA, including Section 905(b) which specifically

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9. A worker who meets the criteria of a state workers' compensation law and the LHWCA may file for compensation under both, concurrently or successively. *Vega-Mena v. United States*, 990 F.2d 684 (1st Cir. 1993).

abrogated *Moragne*'s provision of an unseaworthiness cause of action for longshore and harbor workers. 33 U.S.C.A. § 905(b); *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 165 (1981) (recognizing longshoremen's right to recover for unseaworthiness abolished).

Congress's intent to limit land-based maritime workers to state law remedies against third parties is expressly stated in the legislative history of the 1972 amendments, which provides in pertinent part as follows:

> The purpose of the amendments is to place an employee injured aboard a vessel **in the same position he would be if he were injured in non-maritime employment ashore insofar as bringing a third party action is concerned**, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as "unseaworthiness", "non-delegable duty", or the like. (H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 2 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4698, 4703; emphasis added)[10]

Judicial creation of a new general maritime wrongful death cause of action flies in the face of this unmistakable Congressional intent to preclude special maritime remedies for land-based workers. Contrary to Congress's directive that an employee injured aboard a vessel be placed "in the same position he would be if he were injured in non-maritime employment ashore" (*Id.*), the Fourth Circuit has created a remedy that embraces disparate treatment by permitting a Virginia employee who happens to be injured on a vessel to assert a third party claim against a contractor that Virginia's workers' compensation law would prevent the same employee

10. Both the Senate and House Committee Reports agree on the language of this statement of purpose. *Scindia*, 451 U.S. at 165-166, n.13.

from maintaining if he were injured on the dock. Such disregard of express Congressional intent is anathema to the judicial function of declaring rather than making the law. *The Lottawanna*, 88 U.S. at 576-577 ("[W]e must always remember that the court cannot make the [maritime] law; it can only declare it."). Judge Widener's dissent from denial of rehearing succinctly states the point:

> In a case such as this in which Congress has made its intention explicit, I suggest it is beyond our warrant to substitute our notions of public policy for that of Congress. *Local 1976, United Bhd. of Carpenters and Joiners v. N.L.R.B.*, 357 U.S. 93, 100 (1958) ("[I]t is the business of Congress to declare policy and not this Court's. The judicial function is confined to applying what Congress has enacted after ascertaining what it is that Congress has enacted.") "Whether the federal policy is a wise one is for the Congress and the Chief Executive to determine. Once they have spoken, it is our function to enforce their will." *United States v. Georgia Pub. Serv. Comm'n*, 371 U.S. 285, 293 (1965). (App. 67a)

The Fourth Circuit's creation of a new general maritime wrongful death remedy must accordingly be reversed.

III. Creating A New General Maritime Law Wrongful Death Cause Of Action To Trump Virginia's "Statutory Employer" Law Impermissibly Violates The State's Right To Regulate Tortious Conduct Within State Borders.

Our constitutional system is founded on the federalist principle that the States possess sovereign authority over "[a]ll the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people." The Federalist No. 45 at 296 (James Madison) (Isaac

Kramnick ed. 1987). Consequently, a State may establish rules applicable on land and water within its limits, even though these rules incidentally affect maritime affairs, provided that the state action does not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations. *Askew v. American Waterways Operators*, 411 U.S. 325, 339 (1973).

The exercise of admiralty jurisdiction does not result in automatic displacement of state law. *Yamaha,* 516 U.S. at 206. On the contrary, federal maritime law has long recognized and accommodated the states' interest in regulating maritime affairs within their territorial waters, particularly with respect to wrongful death rights and remedies. *Id.*; *City of Norwalk*, 55 F. 98, 108 (S.D.N.Y. 1893) (courts have acknowledged states' interests with respect to tortious actions culminating in death within their territorial waters), *aff'd in part, rev'd in part*, 61 F. 364 (2d Cir. 1894). The States' right to govern conduct and recovery in the area of wrongful death has been confirmed by Congress in DOHSA ("The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to . . . . any waters within the territorial limits of any State . . ."), 46 U.S.C.A. § 767 (West 1975), and by this Court's holding in *The Tungus v. Skovgaard,* 358 U.S. 588 (1959), that admiralty courts enforcing a State wrongful death statute may not "pick and choose" among provisions but must enforce the State's policy *en toto*:

> The policy expressed by a State Legislature in enacting a wrongful death statute is not merely that death shall give rise to a right of recovery, nor even that tortious conduct resulting in death shall be actionable, but that damages shall be recoverable when conduct of a particular kind

> results in death. It is incumbent upon a court enforcing that policy to enforce it all; it may not pick or choose. (*Id.* at 593)

Here, the Virginia Wrongful Death Act provides a cause of action for Garris to assert against third parties causing death in Virginia territorial waters. Va. Code Ann. § 8.01-50 *et seq*. That right of action is, however, subject to certain limitations prescribed by the Virginia legislature, including the immunity for "statutory employers" provided under the Virginia Workers' Compensation Act. Va. Code Ann. § 65.2-302 (2000).[11] This statutory scheme reflects the Virginia General Assembly's policy determination that general contractors in Virginia should bear the same burden (i.e. responsibility for workers' compensation payments owed to any injured employee) and benefit (immunity from tort liability) as direct employers with respect to the death of a Virginia worker in Virginia territorial waters. Virginia's policy determination is particularly compelling in the context of a local, land-based activity such as longshore and harbor work.[12]

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11. The statutory employer provision renders general contractors "liable to pay to any worker employed in the work any compensation due under this title [Workers' Compensation] which he would have been liable to pay if that worker had been immediately employed by him." Va. Code Ann. § 65.2-302 (2000) (bracketed material supplied). This provision is intended to protect employees of subcontractors who are not financially responsible and to prevent employers from relieving themselves of workers' compensation liability by subcontracting away work which they would otherwise do through direct employees. *Vess v. Davis Elec. Constructors, Inc.*, 613 F. Supp. 1047, 1049 (W.D. Va. 1985), *aff'd w/o op.*, 818 F.2d 30 (4th Cir. 1987); *Henderson v. Central Tel. Co.*, 233 Va. 377, 355 S.E.2d 596, 598-599 (1987).

12. Unlike ships and their crew, which move from port to port, longshore and harbor workers are a local workforce employed by local businesses to provide services at a given port in a single state.

The Fourth Circuit erred in attempting to preclude application of the statutory employer defense to Garris's claim in this case by creating an "end run" around Virginia state law in the form of a new negligence-based general maritime wrongful death cause of action. (App. 45a-48a) Virginia's sovereign authority to legislate wrongful death liability for a non-seaman killed in state territorial waters should be upheld by this Court regardless of whether that legislation favors plaintiff or defendant in this particular case. *See Hess v. United States*, 361 U.S. 314, 320 (1960) ("We are concerned with constitutional adjudication, not with reaching particular results in given cases.").[13]

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13. Most, if not all, state wrongful death statutes provide remedies at least as favorable to plaintiffs as those provided under the general maritime law for wrongful death. In *Miles v. Apex Marine Corp.*, 498 U.S. 19, 33 (1990), this Court held that "there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman . . . whether under DOHSA, the Jones Act, or the general maritime law." Somewhat more expansive remedies are available to the estate of a deceased worker covered by the LHWCA. *See Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974) (approving recovery of loss of society to the dependent spouse of a longshoreman killed in state territorial waters). State wrongful death statutes, including Virginia's, generally permit recovery of all provable pecuniary and non-pecuniary damages in wrongful death cases. *See* Va. Code Ann. § 8.01-52 (damage to include compensation for "sorrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent"); W. Page Keeton, *Prosser and Keeton on Torts* 951 (5th ed. 1984) ("though the recovery for loss of society and comfort is denied under some statutes, it is an item usually recognized and made the basis for an award, at times apparently substantial").

IV. The Fourth Circuit's Result-Oriented Ruling Cannot Be Justified On Uniformity Grounds.

Consistent with its admiralty jurisdiction[14], an admiralty court may declare a uniform rule where required to protect "a 'characteristic feature' of admiralty" or when "uniform application [of the rule is] necessary to maintain the 'proper harmony' of maritime law" in its international and interstate relations. *American Dredging Co.*, 510 U.S. at 447; *see Jensen*, 244 U.S. at 216. This is not such a case. A judge-made negligence-based, wrongful death remedy applicable in state territorial waters is not a "characteristic feature" of admiralty. Nor is the uniform application of such a remedy necessary to maintain the "proper harmony" of maritime law in its international and interstate relations. The Fourth Circuit, therefore, erred in creating a new remedy for Garris to assert against Norshipco.[15]

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14. "The Constitution provides that the federal judicial power 'shall extend . . . to all Cases of admiralty and maritime Jurisdiction.' " *American Dredging Co. v. Miller*, 510 U.S. 443, 446 (1994) (quoting U.S. Const. Art. III, § 2, cl. 1).

15. The Fourth Circuit erroneously determined that an admiralty court should fashion a new maritime cause of action whenever "(1) Congress ha[s] not affirmatively expressed an intention to bar such a cause of action; and (2) creation of that cause of action [is] consistent with the policies of general maritime law articulated in the Jones Act — uniformity in the exercise of admiralty jurisdiction." *Garris*, 210 F.3d at 220 (App. 43a). This test permits judicial law-making whenever Congress has not expressly legislated on a subject and uniform rules would be helpful on that subject. It does not address the fundamental purpose of uniformity — to protect only the essential or characteristic features of admiralty. *Just v. Chambers*, 312 U.S. 383, 392 (1941).

A. A Negligence-Based, Wrongful Death Remedy Is Not A Characteristic Feature Of Admiralty.

Characteristic features of admiralty are those features that "originated in admiralty" or have "exclusive application there." *American Dredging Co.*, 510 U.S. at 450. For example, the warranty of seaworthiness originated in admiralty and primarily has exclusive application there. *See Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 100 (1944); *The Osceola*, 189 U.S. 158, 175 (1903). Likewise, an *in rem* action against a vessel is "distinctively an admiralty proceeding, and is hence within the exclusive province of the federal courts." *American Dredging Co.*, 510 U.S. at 447 (citing *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 431 (1867)).

Neither the concept of negligence nor the remedy for wrongful death originated or have exclusive application in admiralty. Admiralty law refused to recognize negligence in the early 1900's, *The Osceola*, 189 U.S. 158, 175 (1903), while "[a]bout the year 1825, negligence began to be recognized as a separate and independent basis of tort liability" in common law. William L. Prosser, *The Law of Torts*, § 28, at 140 (4th ed. 1971). Admiralty law also refused to recognize a remedy for wrongful death until long after development of wrongful death remedies in state and federal legislation. *See Moragne*, 398 U.S. at 389-90; *The Harrisburg*, 119 U.S. at 213-14. Furthermore, wrongful death, negligence actions do not enjoy exclusive application in admiralty. As the *Moragne* opinion aptly pointed out: "[i]n the United States, every State today has enacted a wrongful-death statute." *Moragne*, 398 U.S. at 390.

In short, therefore, the remedy Garris seeks to assert in this case is not one of the "characteristic features" of admiralty. "To the contrary, it is and has long been a doctrine of general application." *American Dredging Co.*, 510 U.S. at 450.

B. Wrongful Death Remedies Based On Negligence Need Not Be Uniform To Protect The Harmony Of General Maritime Law.

While uniformity is certainly an important goal, it is not "absolute" in scope or degree. *American Dredging Co.*, 510 U.S. at 451. Uniformity does not require "federal rules of decision" on every issue arising under admiralty jurisdiction. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 545 (1995). "Uniformity is required only when the essential features of an exclusive federal jurisdiction are involved." *Just v. Chambers*, 312 U.S. 383, 392 (1941). Consequently, uniformity does not command strict congruity on every legal remedy recognized in admiralty. The Constitution granted exclusive admiralty jurisdiction for "the convenience of the commercial world . . ." *The Lottawanna*, 88 U.S. at 575. The commercial world merely requires settled and predictable substantive rules — "rules upon which maritime actors [can] rely in making decisions about primary conduct." *American Dredging Co.*, 510 U.S. at 454. Settled and predictable rules tell maritime actors "how to manage their businesses and what precautions to take." *Id.* Thus, uniformity requires only stable and predictable substantive maritime law — not absolute standardization of every remedy recognized in admiralty.

1. This Court Has Concluded That State Wrongful Death Remedies Do Not Implicate Uniformity Concerns.

"There is no merit to the contention that application of state law to determine rights arising from death in state territorial waters is destructive of the uniformity of federal maritime law." *The Tungus v. Skovgaard*, 358 U.S. 588, 594 (1959). This Court long ago "concluded that extending state wrongful-death statutes to fatal accidents in territorial waters was compatible with substantive maritime policies." *Yamaha*

516 U.S. at 207 (citing *Western Fuel Co.*, 257 U.S. at 242). Simply put, state wrongful death remedies are "local in character" and thus do not implicate uniformity concerns. *Western Fuel Co.*, 257 U.S. at 242. Accordingly, "variations in the remedies afforded by the States [have] long been deemed compatible with federal maritime interests." *Yamaha*, 516 U.S. at 211.

2. Congress Has Concluded That State Wrongful Death Remedies Do Not Implicate Uniformity Concerns.

Through its legislation in this area over the last century, Congress has repeatedly concluded that application of state wrongful death remedies does not upset the uniformity of general maritime law.

Congress passed DOHSA in 1920. Section 7 of DOHSA states: "The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter." 46 U.S.C.A. § 767 (West 1975). DOHSA thus reflects Congress's determination that the dictates of admiralty do not require a uniform death remedy in state territorial waters: "Congress did not extend DOHSA to territorial waters because it believed state statutes sufficient in those areas." *Miles*, 498 U.S. at 25; *accord Moragne*, 398 U.S. at 397-98; *The Tungus*, 358 U.S. at 593 ("The legislative history of the Death on the High Seas Act discloses a clear congressional purpose to leave 'unimpaired the rights under State statutes as to deaths in waters within the territorial jurisdiction of the States.' "); *see also* 1 Steven F. Friedell, *Benedict on Admiralty* § 105 n.19 (citing 59 Cong. Rec. 4482, 4486).

Congress made a like determination in 1927 when it passed the LHWCA. Congress obviously had the opportunity to fashion uniform wrongful death remedies for harbor workers when it passed the LHWCA, as it had previously

done for seamen in the Jones Act, 46 U.S.C.A. § 688(a) (West Supp. 2000), and for all persons killed on the high seas in DOHSA, 46 U.S.C.A. § 761 (West 1975). Yet Congress rejected in the LHWCA a uniform tort remedy for harbor workers killed in state territorial waters and instead opted for a no-fault workers' compensation remedy that harbor workers could assert against their employers, 33 U.S.C.A. § 909 (West 1986). In doing so, Congress once again accepted non-uniform state laws as the source for any negligence-based, wrongful death remedies in state territorial waters.[16]

Congress reiterated that view for the third time in 1972 when it passed amendments to the LHWCA. These amendments continued to relegate harbor workers to state law for any negligence-based recovery for wrongful death against non-vessel parties. The timing of those amendments alone is significant. It shows that Congress remained steadfast in its preference for state wrongful death statutes for harbor workers despite the passage of nearly 50 years that otherwise saw increasing liberality in remedies

16. By granting different remedies to harbor workers and seamen, Congress decided that harbor workers and seamen do not require the same type of uniform protection. In its cases distinguishing Jones Act seamen and harbor workers, this Court has recognized the unique "perils" that Jones Act seamen encounter as a result of their "substantial" connection to a vessel in navigation. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368 (1995). Harbor workers, who "have only a transitory or sporadic connection to a vessel in navigation" are not entitled to the tort remedy provided in the Jones Act. *Id.* Nor are harbor workers entitled to unseaworthiness remedies. 33 U.S.C.A. § 905(b) (West 1986). As land-based workers, harbor workers typically live and work on land. Like their friends and neighbors on land, they are entitled to the protections of state law — with the one exception being the Congressionally mandated workers' compensation protections provided in the LHWCA. *See Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 722, 723-24 (1980) (noting that Congress intended the LHWCA to raise workers' compensation benefits "to a federal minimum").

for injured persons not only in admiralty, but in the law generally. *See Moragne*, 398 U.S. at 390.

The 1972 amendments are especially significant insofar as they expressly overturned the expansion of the unseaworthiness doctrine to harbor workers recognized in *Moragne*. This negation of special, uniform maritime remedies is expressed in what is now 33 U.S.C. § 905(b), which specifically eliminates the right of longshoremen and harbor workers to recover against a vessel on the basis of unseaworthiness. *See Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156, 165 (1981) (recognizing that 1972 amendments abolished longshoremen's right to recover for unseaworthiness).

In addition to overruling the remedy that *Moragne* granted, Congress expressed its intention in the legislative history of the 1972 amendments that general judge-made admiralty remedies should not supplement the LHWCA or existing state law remedies. That legislative history reveals that in passing § 905(b), Congress intended:

> **to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned,** and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as "unseaworthiness," "non-delegable duty," or the like. (H.R. Rep. No. 92-1441 (1972); 1972 U.S.C.C.A.N. at 4703; emphasis supplied)

In other words, in repealing *Moragne* Congress expressed the plain view that harbor workers killed in state territorial waters should be governed by state wrongful death statutes for any negligence-based recovery. *See also Parker v. South*

Louisiana Contractors, Inc., 537 F.2d 113, 117 (5th Cir. 1976), *cert. denied*, 430 U.S. 906 (1977) ("Taken as a whole," therefore, "the manifest purpose of section 905(b) is to curtail rather than expand the availability of third party actions in admiralty.").

Viewed together, this history evinces quite clearly Congress's "considered judgment," *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978), "not to intrude on state legislative competence" regarding the ability of harbor workers to recover in negligence for deaths in state territorial waters, Friedell, *Benedict on Admiralty* § 105 n.19, "because Congress believed state statutes sufficient in those areas." *Miles*, 498 U.S. at 25; *see also Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985) (looking to legislative history of 1972 LHWCA amendments to ascertain congressional purpose behind enactment); *accord, Director, Office of Workers' Compensation Programs v. Perini North River Assocs.*, 459 U.S. 297 (1983); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977); *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980).

The significance of this Congressional determination cannot be overstated. It is, of course, a settled proposition that " '[f]ederal courts are bound to apply rules enacted by Congress with respect to matters . . . over which it has legislative power.' " *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 27 (1988) (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967)). Where Congress has spoken on such a matter, therefore, it is not for the courts to debate the "wisdom" or the "pros and cons" of Congress's choice. *MCI Telcoms. Corp. v. AT & T.*, 512 U.S. 218, 234 (1994); *United States v. Rodgers*, 466 U.S. 475, 484 (1984). A court must defer to that decision regardless of whether a court believes Congress's choice would "lead to a harsh result." *United States v. Locke*, 471 U.S. 84, 95 (1985).

These principles reflect the fundamental fact "that the federal lawmaking power is vested in the legislative, not the judicial, branch of government; therefore, federal common law is 'subject to the paramount authority of Congress.' " *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 (1981) (quoting *New Jersey v. New York*, 283 U.S. 336, 348 (1931)). "Thus, once Congress addresses a subject, even a subject previously governed by federal common law, the justification for lawmaking by the federal courts is greatly diminished. Thereafter the task of the federal courts is to interpret and apply the statutory law, not to create common law." *Northwest Airlines*, 451 U.S. at 95 n.34 (citing *Illinois v. Milwaukee*, 406 U.S. 91, 107 (1972), and *Arizona v. California*, 373 U.S. 546, 565-66 (1963)). Any contrary approach would be antithetical to our democratic system of government and would embroil courts in "usurp[ing] the policymaking and legislative functions of duly elected representatives." *Heckler v. Mathews*, 465 U.S. 728, 741 (1984).

These principles fully apply to the realm of admiralty jurisdiction. As in other substantive areas of the law, courts are "poorly positioned" to second-guess the merits of congressional enactments in admiralty, even where those enactments subject longshoremen "to the mercies of state law." *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 215-16 (1971). Debates over the merits of those decisions "are best presented in the legislative forum, not here." *Id.* at 216. Consequently, as this Court has recognized on numerous occasions, courts should not resort to general admiralty jurisdiction to supplement a remedial admiralty scheme enacted by Congress. *Dooley v. Korean Airlines Co., Ltd.*, 524 U.S. 116, 124 (1998) ("Even in the exercise of our admiralty jurisdiction, we will not upset the balance struck by Congress by authorizing a cause of action with which Congress was certainly familiar but nonetheless declined to adopt."); *Northwest Airlines*, 451 U.S. at 95 ("Even in

admiralty, however, where the federal judiciary's lawmaking power may well be at its strongest, it is our duty to respect the will of Congress."); *Mobil Oil*, 436 U.S. at 624 ("because Congress' considered judgment has great force in its own right . . . a desire for uniformity cannot override the statute.").

Indeed, this Court has on several occasions declined to utilize general admiralty jurisdiction to fashion a remedy in light of the LHWCA and the 1972 amendments to that Act. The exercise of that power, the Court concluded, could upset the careful balance of interests settled upon by Congress in those enactments, making inappropriate the expansion of new remedies by judicial decree. *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979); *Cooper Stevedoring, Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974); *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp.*, 342 U.S. 282 (1952), *overruled in part*, 421 U.S. 397 (1975).

That historical restraint should continue here. Congress has enacted a comprehensive statute, the LHWCA, that governs harbor workers injured or killed in state territorial waters. Through that statute, Congress has made clear that, in its opinion, application of state wrongful death statutes to harbor workers does not offend admiralty principles. *See Dooley*, 524 U.S. at 122-124 (relying on comprehensive nature of DOHSA to reject judge-made survivor action for death on high seas); *Northwest Airlines*, 451 U.S. at 97 ("The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme. . . ."). That statute has been the prevailing view of Congress for the better part of a century. *See Walters v. National Ass'n. of Radiation Survivors*, 473 U.S. 305, 323 (1985) (courts cannot "cavalierly dismiss[] a long-asserted congressional purpose" reflected in a statute of long standing); *accord, Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund*, 527 U.S. 308, 332 (1999); *MCI*, 512 U.S. at 234.

Against this backdrop of congressional action, it would be improper and imprudent for the Court to declare that notions of uniformity require a negligence-based tort remedy in admiralty for harbor workers killed in state territorial waters. Such a declaration would have courts improperly "substitute [their] views for those expressed by Congress." *Dooley*, 524 U.S. at 123 (quoting *Mobile Oil*, 436 U.S. at 626)).

C. Creating A New General Maritime Wrongful Death Remedy To Further Uniformity Is Unnecessary And Ill-Advised.

Not only has the Court and Congress determined that the lack of a uniform negligence-based, wrongful death remedy in state territorial waters does not upset uniformity, but creating such a remedy now will upset the settled reliance interest of maritime actors on the current remedial regime. The Court in *Western Fuel Co. v. Garcia*, 257 U.S. 233, 242 (1921), held that admiralty courts should recognize and enforce available state wrongful death remedies. Furthermore, when Congress passed DOHSA in 1920, it did not legislate within state territory because it wanted to preserve the application of state wrongful death remedies. *Moragne*, 398 U.S. at 398. Thus, at least since the early 1920's, maritime actors have known that state wrongful death remedies apply to deaths occurring on state territorial waters. Since the early 1920's, therefore, maritime actors have conformed their business practices and primary conduct in reliance on the availability of state wrongful death remedies.

Admiralty courts are not free to select and enforce only the agreeable facets of state law; they must enforce the state remedial scheme as a whole. "The decisions of this Court long ago established that when admiralty adopts a State's right of action for wrongful-death, it must enforce the right as an integrated whole, with whatever conditions

and limitations the creating State has attached." *The Tungus*, 358 U.S. at 592; *see Hess v. United States*, 361 U.S. 314, 319 (1960); *Goett v. Union Carbide Corp.*, 361 U.S. 340, 342 (1960). Thus, "[i]t is incumbent upon a court enforcing [state] policy to enforce it all; it may not pick or choose." *The Tungus*, 358 U.S. at 593.

State wrongful death remedies take many forms. At least in the employer-employee context, the legislature of every state has seen fit to convert employee tort remedies into a no-fault or strict liability workers' compensation remedy. 1 Arthur Larson, *Workmen's Compensation Law*, § 2.08 (2000) (hereinafter "Larson"). Employees no longer need to assert uncertain tort claims against employers; they receive certain quantifiable benefits regardless of fault for the injury or death. *See* Larson § 1.03; 82 Am. Jur. 2d, *Workers' Compensation*, §§ 5, 6 (1992). On the other hand, employers no longer face the uncertainty of run-away tort claims; they contract with insurers to pay the quantifiable benefits statutorily due to every employee injured or killed on the job. *See* Larson § 1.03; 82 Am. Jur. 2d, *Workers' Compensation*, §§ 5, 6. The wisdom of this conversion has been the subject of much debate. *See New York Central R.R. Co. v. White*, 243 U.S. 188, 199-200 (1917); Martha T. McCluskey, *The Illusion of Efficiency In Workers' Compensation "Reform"*, 50 Rutgers L. Rev. 657 (1998); Theodore F. Haas, *On Reintegrating Workers' Compensation and Employers' Liability*, 21 Ga. L. Rev. 843 (1987). In simple terms, however, obvious economic benefits accrue to the employer, employee, the court system, and to society in general whenever a no-fault workers' compensation scheme replaces a litigious tort recovery scheme. *See, e.g.* 82 Am. Jur. 2d, *Workers' Compensation* § 5. Congress has approved of this conversion for harbor workers and District of Columbia employees.

See 33 U.S.C.A. §§ 901-950 (West 1986); *Washington Metro. Area Transit Auth. v. Johnson*, 467 U.S. 925, 931 (1984) (discussing the legislative "compromise" inherent in the LHWCA); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 412 (1953) (discussing LHWCA goal of "protect[ing] employers who are subject to absolute liability by the Act").

The workers' compensation schemes of the various states are not all uniform. *See* Larson, § 2.08. Nor are they all like the LHWCA. *See Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 722, 725 (1980). One difference is that the workers' compensation statutes in Virginia and several other states provide slightly greater tort immunity to general contractors as "statutory employers" than that found in the LHWCA. *Compare* Va. Code Ann. §§ 65.2-307(A), -302 (Michie 1995) *with* 33 U.S.C.A. §§ 902(4), 905(a) (West 1986); *see Ward v. Norfolk Shipbuilding & Drydock Corp.*, 770 F. Supp. 1118, 1120 (E.D. Va. 1991) (Virginia law); *Leone v. Columbia Sussex Corp.*, 610 N.Y.S.2d 586, 587 (N.Y. App. Div. 1994) (New York law); *Torch Operating Co. v. Bartell*, 865 S.W.2d 552, 555 (Tex. Ct. App. 1993) (Louisiana law); *Walker v. United Steel Workers, Inc.*, 606 So. 2d 1243, 1244 (Fla. Dist. Ct. App. 1992) (Florida law); *Matthews v. United States*, 825 F.2d 35, 36-37 (4th Cir. 1987) (Maryland law); *Garvin v. Alumax of South Carolina, Inc.*, 787 F.2d 910, 912 (4th Cir.) (South Carolina law), *cert. denied*, 479 U.S. 914 (1986); *Capetola v. Barclay White Co.*, 139 F.2d 556, 559-60 (3d Cir. 1943) (Pennsylvania law), *cert. denied*, 321 U.S. 799 (1944); *see also* 82 Am. Jur. 2d, *Workers' Compensation* § 71 (1992).

The Fourth Circuit recognized this difference in tort immunity with regard to the Virginia workers' compensation scheme. It assumed that Norshipco was Garris' statutory employer under the Virginia Workers' Compensation Act and,

therefore, determined that Norshipco had an affirmative defense to Garris' claim under the Virginia Wrongful Death Act. *Garris*, 210 F.3d at 220 (App. 43a) (Garris "apparently cannot recover against [Norshipco] under the Virginia wrongful-death statute").[17]

Noting that Garris could only assert a workers' compensation claim, the Fourth Circuit concluded that she had "no right of recovery under the existing statutory scheme." *Id.* This conclusion prompted the Fourth Circuit to create a new tort remedy. *Id.* at 220-21 (App. 45a) ("We see no reason to deny Garris a basis of recovery simply because her son was a harbor worker who died in Virginia"). By doing so, the Fourth Circuit substituted its judgment for the considered judgment of the 140-member Virginia General Assembly. In direct contrast to the Virginia General Assembly, the Fourth Circuit apparently believed that Garris should have a negligence action against Norshipco in addition to her no-fault workers' compensation claim.

Maritime employers and contractors employing workers in Virginia and other states must insure against workers' compensation liability. Because the LHWCA and state workers' compensation laws operate concurrently, *see Sun Ship, Inc.*, 447 U.S. at 721, this liability may not be the same in every case; it depends upon whether the injured worker files his claim under state law, the LHWCA, or both. The liability of the employer, nevertheless, is based on no-fault principles. Its value is pre-determined by a statutory schedule, 82 Am. Jur. 2d § 6; 33 U.S.C.A. §§ 908, 909,

17. The district court did not rule on Garris' state law wrongful death claim. It merely dismissed the state claim without prejudice. (App. 20a) Garris did not appeal the dismissal, or brief the merits of her state claim, to the Fourth Circuit. (App. 23a) Thus, the issue of Norshipco's Virginia workers' compensation tort immunity has never been fully litigated in this case. Garris merely claims that she has no meritorious tort remedy against Norshipco. For purposes of argument in this brief, Norshipco agrees.

with disagreements being decided in an abbreviated administrative forum. 82 Am. Jur. 2d §§ 517, 518; 33 U.S.C.A. § 919. Thus, employers including levels of general and subcontractors are able to structure their business dealings to economically insure sufficient workers' compensation coverage for their employees.

Creating a new tort-based cause of action for harbor workers in state territorial waters would upset the settled and predictable state rules under which maritime employers currently operate. Adding the new remedy may place maritime contractors and subcontractors in the untenable position of defending against both no-fault workers' compensation liability and negligence-based tort liability asserted by the same employee. This would transform the current settled and predictable no-fault scheme into an unpredictable and expensive dual liability scheme. *American Dredging Co.*, 510 U.S. at 454.

The cost and inequity of being subject to both species of liability should not be underestimated. Before the 1972 amendments to the LHWCA, judge-made admiralty rules began to partially destroy employer tort immunity under the LHWCA. At that time, developing maritime law permitted shipowners to seek indemnity against stevedores for tort damages paid to longshoremen injured onboard vessels. *See Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). Congress amended the LHWCA in 1972 to eliminate this costly indemnity and preserve the employer tort immunity written into the Act. *Howlett v. Birkdale Shipping Co., S.A.*, 512 U.S. 92, 97 (1994); *Scindia Steam Nav. Co., Ltd. v. De Los Santos*, 451 U.S. 156, 171-72 (1981); *see* H.R. Rep. No. 92-1441 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4698, 4704 (expanding on Congressional dissatisfaction with *Ryan* indemnity). Here, the remedy created by the Fourth Circuit may override the workers' compensation tort immunity found in Virginia and other

states. Potentially upsetting the long established and settled state remedial scheme will not serve to promote harmony along the waterfront.

In sum, creating a new wrongful death tort remedy to overlay the current no-fault remedial scheme will harm rather than promote harmony and uniformity. Congress has determined that such a uniform remedy is not needed. Likewise, the collective judgment of the 140-member General Assembly of Virginia is that Garris should not have a negligence-based, tort remedy to assert against Norshipco. In deciding whether to fashion new law even in the domain of admiralty the Court should recognize and heed these clear legislative signals. *See Dooley*, 524 U.S. 123-124; *Northwest Airlines*, 451 U.S. at 95; *Mobil Oil*, 436 U.S. at 626.

CONCLUSION

The relevant acts of Congress and over one hundred years of Supreme Court precedent establish that it is state — not federal — law that has and should continue to govern the availability of a negligence-based wrongful death cause of action for a non-seaman killed in state territorial waters. The fundamental federalism principle underlying these legislative and judicial pronouncements counsels strongly against creation of a new general maritime wrongful death remedy adopted solely to circumvent application of a state "statutory employer" law. Separation of powers is also an overriding concern in this instance: the federal court should not step in to create a cause of action which Congress has had repeated opportunities to consider but has nonetheless declined to adopt. These critical constitutional doctrines should not be sacrificed at the altar of uniformity where, as here, existing state law remedies do not implicate a "characteristic feature" of admiralty or interfere with the proper harmony and uniformity of that law in its international or interstate

relations — and thus no new general maritime remedy is needed or warranted. The Fourth Circuit's ruling must accordingly be reversed.

Wherefore, for all of the reasons expressed herein, Petitioner Norfolk Shipbuilding & Drydock Corporation respectfully requests this Honorable Court to reverse the opinion and judgment of the Fourth Circuit establishing a new maritime law cause of action for negligence-based wrongful death occurring in state territorial waters.

Respectfully submitted,

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IN THE

Supreme Court of the United States

NORFOLK SHIPBUILDING
& DRYDOCK CORPORATION,

Petitioner,

v.

CELESTINE GARRIS, Administratrix of the Estate of
CHRISTOPHER GARRIS, Deceased,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Is there (or should there be) a general maritime law cause of action for wrongful death that includes liability premised on negligence?

LIST OF PARTIES

All parties to the proceeding below are identified in the caption of this case except E.T. Gresham, Inc. ("Gresham"). Gresham was originally named as a co-defendant in this action and it participated in the proceedings before the United States Court of Appeals for the Fourth Circuit. Upon motion of Celestine Garris, the Court of Appeals entered an order dismissing Gresham from the action, with prejudice, on May 1, 2000.

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STATEMENT OF THE CASE

In April of 1997, Christopher Garris ("Garris"), age 21, (the son of Respondent, Celestine Garris) was employed by Tidewater Temps, Inc. and was working for Mid-Atlantic Coatings ("Mid-Atlantic"), a company in the business of sandblasting and cleaning ships' hulls and holds. On the night of April 8, 1997, Garris was working on board the USNS MAJ. STEPHEN W. PLESS at Pier 11 at the Norfolk Shipbuilding & Drydock Corporation ("Norshipco"), while the vessel was berthed in the navigable waters of the United States. On that night, Mid-Atlantic was working pursuant to a contract with Norshipco for repairs to the ship. At approximately 10:20 p.m., Garris was asked by his supervisor to climb to the top of a reserve sand hopper silo, a structure approximately thirty feet above the deck of the ship that held and funneled sand for use in sandblasting operations. The silo needed to be refilled with sand and a crane was used to raise a container full of sand up to the silo. Once atop the reserve silo, Garris was to throw a hand operated lever on the container that would allow the sand to flow out of the container and into the silo. As a result of a poor communication signaling system that was directed by Norshipco, and as a result of the negligence of a crane operator employed by E.T. Gresham, Inc. ("Gresham"), Garris was knocked off the silo by the crane and he fell to his death on the deck of the ship.

Because Garris was engaged in maritime employment and was working on navigable waters, he was covered by the Longshore & Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, *et seq.* ("LHWCA"), and consequently, his parents received a funeral expense benefit. While the LHWCA § 905(b) specifically provides for an employee's cause of action against "a vessel," this is not such a case, but instead is an action under the general maritime law against other contractors working aboard the vessel. Garris has no statutory cause of action under the LHWCA against Norshipco or Gresham.

Celestine Garris brought suit in the United States District Court for the Eastern District of Virginia against Norshipco and Gresham seeking recovery for the wrongful death of her son based upon negligence under general maritime law and the Virginia wrongful death statute, Va. Code Ann. § 8.01-50. The district court dismissed her suit on the ground that general maritime law does not recognize a negligence-based cause of action.[1]

The district court's dismissal of the wrongful death negligence action under general maritime law was based on its conclusion that *Moragne v. States Marine Lines*, 398 U.S. 375 (1970) did not create a general maritime cause of action for wrongful death caused by negligence. The Fourth Circuit agreed but nonetheless reversed the district court's dismissal after deciding to extend *Moragne* to recognize such a cause of action explaining that

> [b]ecause the creation of a negligence-based wrongful death action is consistent with the principles of uniformity and consistency that formed the basis for *Moragne*, and because Congress has not affirmatively precluded a negligence-based wrongful death claim, we find it appropriate to recognize a general maritime law cause of action for wrongful death based upon negligence.

App. F (21a-49a), *Garris v. Norfolk Shipbuilding & Drydock Co.*, 210 F.3d 209, 219 (4th Cir. 2000). In a concurring opinion,

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1. The district court dismissed with prejudice the general maritime law wrongful death claim. The district court did not exercise supplemental jurisdiction over the state wrongful death action and dismissed the state law claim without prejudice. Celestine Garris thereafter filed the state wrongful death action in state court only against Gresham. That action has since been dismissed by the state court on the ground that Gresham's crane operator was the "borrowed servant" of Norshipco.

a member of the panel agreed with the judgment but argued that *Moragne* need not be extended in order to create such a cause of action because "*Moragne* itself created a cause of action for negligence-based wrongful death." (App. 50a-61a). *Id.* at 223 (Hall, J., concurring).

SUMMARY OF ARGUMENT

When this Court recognized a general maritime wrongful death action for death caused by violation of maritime duties in *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), it expressly overruled the *The Harrisburg*, 119 U.S. 199 (1886) which had held that there was no cause of action for wrongful death under maritime law. *The Harrisburg* involved a claim for *negligence-based* wrongful death by the family of a seaman killed when two vessels collided off the coast of Massachusetts. If, as Norshipco contends, the *Moragne* Court meant to limit the wrongful death action it created to unseaworthiness-based claims, there was no reason for the Court to overturn an eighty-four year old precedent and no reason to use the plural form in referring to "violation of maritime duties." The duty to not act negligently has been recognized as a maritime duty at least since this Court's decision in *Leathers v. Blessing*, 105 U.S. 626 (1882).

In *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996), the unanimous opinion of this Court assumed the existence of a *Moragne* negligence-based wrongful death action under the general maritime law. There the Court was asked to decide if such an action displaced state wrongful death remedies within state territorial waters. The Court concluded it did not, at least where the decedent was not a "seafarer." The *Yamaha* Court observed that "[w]hile unseaworthiness was the doctrine immediately at stake in *Moragne*, the right of action, as stated in the Court's opinion, is 'for death caused by violation of maritime duties.' " *Id.* at 214 n.11. The Court then identified "negligence" as one of those duties citing *Kermarec v.*

Compagnie Generale Transatlantique, 358 U.S. 625 (1959). *Id.*

The Circuits that have addressed this issue have overwhelmingly concluded that *Moragne* either created a negligence-based wrongful death action or that *Moragne* should be extended to create such a cause of action. *See Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084, 1088-89 (2d Cir. 1993); *Garris v. Norshipco*, 210 F.3d 209, 222 (4th Cir. 2000); *Miles v. Melrose*, 882 F.2d 976, 985 (5th Cir. 1989); *Nelson v. United States*, 639 F.2d 469, 473 (9th Cir. 1980); *In re Amtrak "Sunset Limited" Train Crash*, 121 F.3d 1421, 1427 (11th Cir. 1997). Norshipco can point to only two circuit court cases in support of its argument that *Moragne* is limited to claims based on unseaworthiness. *See Ivy v. Security Barge Lines*, 606 F.2d 524 (5th Cir. 1979) and *Ford v. Wooten*, 681 F.2d 712, 716 (11th Cir. 1982). Both cases no longer appear to be good law in their respective circuits as more recent cases in both the Fifth and Eleventh Circuits recognize a *Moragne* cause of action premised on negligence. *See Miles*, 882 F.2d at 985 and *In re Amtrak*, 121 F.3d at 1427.

There is unquestionably a cause of action for negligence under the general maritime law and there is no legal, equitable or policy reason why there should be no federal remedy under general maritime law where that same negligence results in death. To the extent such a distinction exists under federal admiralty law it exists due to the misguided 1886 decision in *The Harrisburg* which the *Moragne* Court described as "dubious even when rendered." *Moragne*, 398 U.S. at 378. This Court has since refused to create distinctions within the general federal maritime law based on whether an accident is fatal or nonfatal. *See Am. Export Lines v. Alvez*, 446 U.S. 274, 281 (1980) ("general federal maritime law is a source of relief for a longshoreman's personal injury, . . . just as it is a source of remedy for wrongful death").

If the remedy for wrongful death of maritime workers within state waters is left to the states, as Norshipco proposes, then state law tort concepts such as the "all or nothing" bar of contributory negligence, assumption of risk, broader "statutory employer" immunity, and differing standards of care for invitees, licensees, etc., will become part of federal admiralty law even though these concepts have been specifically rejected by this Court and by Congress as violative of federal maritime policy. *See The Max Morris v. Curry*, 137 U.S. 1 (1890); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 410 (1953); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959). *See also* Section IV of this Brief (reviewing legislative history of the LHWCA and the Death on the High Seas Act, 46 U.S.C. §§ 761, *et seq.* ("DOHSA").

Norshipco's argument that respect for state sovereignty prohibits recognition of a negligence-based wrongful death action under the general maritime law is really a smokescreen. Norshipco is really only interested in one very discrete difference between Virginia law and federal law. While speaking in grand terms of protecting the "States' powers to protect their citizens by delineating remedies for tortious conduct causing death within state borders" (Norshipco Brief at p. 10), Norshipco's only specific complaint is that Virginia's broader "statutory employer" immunity will not apply to bar Garris's claim if general maritime law applies.[2] This Court has already concluded that Virginia tort law concepts such as contributory negligence, assumption of risk, varying standards of care based on a plaintiff's status as an invitee, licensee, etc., are contrary to fundamental features of federal maritime law and cannot be applied in admiralty cases. Moreover, the Virginia Supreme Court has itself held that the Virginia "statutory employer" immunity cannot be applied to prejudice rights under federal

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2. Unlike the broad immunity granted under the VWCA, the "statutory employer" immunity afforded by the LHWCA would not bar Garris's claim.

maritime law. *See Mizenko v. Electric Motor & Contracting Co.*, 244 Va. 152, 419 S.E.2d 637 (1992). Norshipco points to no other feature of Virginia law that it contends must be applied to claims within federal admiralty jurisdiction in order to avoid "trumping" of states' rights.

Norshipco's argument that the 1972 amendments to the LHWCA did away entirely with the *Moragne* cause of action is refuted by both the language of the statute and the legislative history of those amendments. Congress clearly retained the right of maritime workers to pursue negligence claims against third parties. If, as Garris contends, *Moragne* itself created a negligence-based wrongful death action then this action was specifically preserved by Congress when the 1972 amendments were passed. If, as Norshipco contends, *Moragne* did not recognize a negligence-based wrongful death action, neither the 1972 amendments nor the legislative history of the amendments evinces any hostility toward recognition of such an action.

As with the 1972 amendments to the LHWCA, DOHSA and its legislative history do not demonstrate any intent by Congress to preempt this Court's historical power and obligation to supplement the DOHSA remedies where doing so will promote the goal of uniformity in the administration of federal maritime law. Norshipco's argument to the contrary seems to have been raised and rejected like clockwork every ten years. *See Moragne*, 398 U.S. at 402 (1970); *Am. Export Lines*, 446 U.S. at 282-84 (1980); *Miles v. Apex Marine Corp.*, 498 U.S. at 27 (1990); *Garris*, 210 F.3d 209 at 221-22 (4th Cir. 2000) (App. 29a-31a).

ARGUMENT

I.

MORAGNE CREATED A GENERAL MARITIME CAUSE OF ACTION FOR WRONGFUL DEATH THAT IS NOT LIMITED TO LIABILITY PREMISED ON BREACH OF THE DUTY OF SEAWORTHINESS.

Norshipco contends that *Moragne v. States Marine Lines*, 398 U.S. 375 (1970) created a very limited federal cause of action for wrongful death caused by an unseaworthy condition aboard a vessel and that its holding was overturned two years later by the 1972 amendments to the LHWCA (the "1972 Amendments"). Brief of Norshipco at 15, 16 n.7. In light of the hundreds of cases that have interpreted, applied or referred to *Moragne* since 1972 (including several opinions of this Court[3]), Norshipco's argument makes up for in simplicity what it lacks in accuracy. Norshipco is simply wrong on both fronts.[4]

A. *The Harrisburg* and *Moragne* decisions.

Like Christopher Garris, Edward Moragne was a longshoreman who was killed aboard a vessel in United States and state territorial waters. His widow brought a wrongful death suit in Florida state court against the shipowner alleging Moragne's death was caused by the shipowner's negligence and by an unseaworthy condition of the vessel. Based on diversity of citizenship, the vessel owner removed the case to federal district court and sought dismissal of the

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3. Aside from the dissenting opinion of Judge Widener to the Fourth Circuit's denial of rehearing *en banc*, Norshipco does not cite to a single case holding (or commentator who concludes) that the 1972 amendments to the LHWCA overturned any negligence-based maritime cause of action.

4. Norshipco's argument that *Moragne* was overturned by the 1972 Amendments is addressed in section IV.A. of this Brief.

unseaworthiness claim. The District Court dismissed the unseaworthiness portion of the complaint on the ground that neither federal nor Florida's wrongful death statute allowed a wrongful death action premised on unseaworthiness in state territorial waters. *Moragne*, 398 U.S. at 376. The District Court relied on *The Harrisburg*, 119 U.S. 199 (1886) which held that maritime law does not recognize a cause of action for wrongful death.

The Harrisburg involved a ***negligence*** action brought against the steamer HARRISBURG by the widow and child of an officer of the schooner MARIETTA TILTON who died when the two vessels collided in Nantucket Sound. The District Court entered judgment for the widow and child holding that "in the admiralty courts of the United States the death of a human being upon the high seas, or waters navigable from the sea, caused by negligence, may be complained of as an injury, and the wrong redressed, under the general maritime law." *Id.* at 200. On appeal the Supreme Court reviewed the judicial decisions of the lower courts (which overwhelmingly had recognized such a cause of action) and then held that no such cause of action existed in admiralty because such actions were not part of the common law or the maritime law, as accepted and received from maritime nations generally. *Id.* at 213.

This Court's opinion in *Moragne* overturned *The Harrisburg* describing the opinion as "somewhat dubious even when rendered" and concluding that it was "such an unjustifiable anomaly in the present maritime law that it should no longer be followed." *Moragne*, *supra*, at 378. However, the *Moragne* opinion takes great pains to stress the importance of *stare decisis* noting that longstanding precedent should not be lightly overruled. *Id.* at 403. However, nothwithstanding the *stare decisis* concerns, the *Moragne* Court held as follows: "We accordingly overrule *The Harrisburg*, and hold that an action does lie under general maritime law for death caused by violation of maritime duties." *Id.* at 409.

Given the *Moragne* Court's extended exposition on *stare decisis* principles it bears repeating that *The Harrisburg* was a wrongful death claim premised on negligence. Norshipco's (and the Fourth Circuit's) overly technical reading of *Moragne* is difficult to reconcile with the uniformity goals announced in the opinion as well as the fact that after paying homage to the principle of *stare decisis*, the Court expressly overturned an 84 year old Supreme Court precedent. If the *Moragne* Court meant to limit the wrongful death action it was creating to claims based solely on unseaworthiness, there was no reason to overturn *The Harrisburg* and there was no reason for the Court to hold "that an action does lie under general maritime law for death caused by violation of maritime duties." *Moragne*, 398 U.S. at 409.[5]

At least since the decision in *Leathers v. Blessings*, 105 U.S. 626 (1881), this Court has recognized a general negligence cause of action for personal injury under federal maritime law. *See* 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 7-10 (3d ed. 2001). In *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 413-14 (1953), the Court stated: "the fact that *Sieracki* upheld the right of workers like Hawn to recover for unseaworthiness does not justify an argument that the Court thereby blotted out their long-recognized right to recover in admiralty for negligence." The *Pope* Court went on to cite a

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5. This Court has already rejected a similarly hyper-technical reading of *Moragne*. In *Miles v. Apex Marine Corp.*, 498 U.S. 19, 30 (1990) the court observed:

> There is also little question that *Moragne* intended to create a general wrongful maritime wrongful death action applicable beyond the situation of longshoremen. For one thing, *Moragne* explicitly overruled *The Harrisburg*. *The Harrisburg* involved a true seaman. . . . If there has been any doubt about the matter, we today make explicit that there is a general maritime cause of action for wrongful death of a seaman, adopting the reasoning of the unanimous and carefully crafted opinion in *Moragne*.

long list of cases which illustrate "the unbroken line of federal cases holding that persons working on ships for independent contractors or persons rightfully transacting business on ships can recover for damages due to shipowners' negligence." *Id.* at 414 n.6. *See also Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959); *Yamaha*, 516 U.S at 214 n.11. Thus, the exercise of due care or the duty to not act negligently has been recognized as a "maritime duty" for at least 120 years.

In support of its decision to overrule *The Harrisburg*, the *Moragne* court identified three anomalies created by *The Harrisburg:*

> The first of these is simply the discrepancy produced whenever the rule of *The Harrisburg* holds sway: within territorial waters, identical conduct violating federal law (here the furnishing of an unseaworthy vessel) produces liability if the victim is merely injured, but frequently not if he is killed. As we have concluded, such a distinction is not compatible with the general policies of federal maritime law.

Moragne, 398 U.S. at 395. While the other two anomalies referenced in the *Moragne* opinion are specific to claims based on unseaworthiness, this first anomaly would continue to exist under Norshipco's reading of *Moragne*.

Norshipco must acknowledge that negligent conduct is actionable under the general maritime law if the maritime worker is merely injured. *See Leathers v. Blessings*, 105 U.S. 626, 630 (1882). However, Norshipco contends that identical negligent conduct has no *federal* remedy if it results in the death of the maritime worker within state waters. Norshipco contends that state wrongful death statutes provide a sufficient remedy.[6] But

6. After *Yamaha* it appears that Garris is a "seafarer" and as such he cannot bring a state wrongful death action. *See* Section III.B. of this Brief.

the application of broader state "statutory employer" immunity or the "all or nothing" contributory negligence rule will often mean that there is no remedy for the worker's death. Thus, the first anomaly described in *Moragne* continues to exist if there is no negligence-based wrongful death action under the general maritime law.

B. Post-*Moragne* Supreme Court decisions.

In *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990), the Court noted that *Moragne* "overruled *The Harrisburg* and created a general maritime wrongful death cause of action." In addition, the *Miles* Court understood *Moragne* to have extended DOHSA's wrongful death action to territorial waters in order to further uniformity in the exercise of admiralty jurisdiction. *Miles*, *supra*, at 29-30. DOHSA provides a wrongful death action based on both negligence and unseaworthiness. *See* 46 U.S.C § 761. *See also Strehle v. United States*, 860 F. Supp. 136, 139 (S.D.N.Y. 1994), *aff'd*, 54 F.3d 765 (2d Cir. 1995). In *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 214 n.11 (1996), this Court recognized that "[w]hile unseaworthiness was the doctrine immediately at stake in *Moragne*, the right of action, as stated in the Court's opinion, is for 'death caused by violation of maritime duties.' "

In *Yamaha*, this Court assumed the existence of a general maritime negligence-based wrongful death action. In *Yamaha*, twelve-year-old Natalie Calhoun was killed in a jet ski accident at a beach in Puerto Rico. Her parents brought a **negligence-based** wrongful death action under state law against the jet ski manufacturer. The jet ski manufacturer argued that because the accident occurred on navigable waters, state remedies were displaced by the federal maritime wrongful death action recognized in *Moragne*. This Court disagreed holding that the *Moragne* wrongful death claim does not supply the exclusive remedy in cases involving the deaths of "nonseafarers" in territorial waters. *Id.* at 216.

Essential to the discussion and holding in *Yamaha* is the existence of a general maritime negligence-based wrongful death action that might arguably displace state law remedies. If, as Norshipco contends, no such cause of action exists under general maritime law then *Yamaha* is meaningless because the federal claim that the Court found did not preempt state law remedies does not exist to begin with.[7] In fact, *Yamaha* seems to go beyond merely assuming the existence of a negligence based *Moragne* action. The Court pointed out that:

> While unseaworthiness was the doctrine immediately at stake in *Moragne*, the right of action, as stated in the Court's opinion, is for "death caused by violation of maritime duties. *Id.* at 409. *See East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858 (1986) (maritime law incorporates strict product liability); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959) (negligence). *See also* G. Gilmore & C. Black, *The Law of Admiralty* 368 (2d ed. 1975).

Id. at 214 n.11. Gilmore and Black state in their treatise that "it clearly follow[ed]" from *Moragne* that "[T]he *Moragne* remedy . . . provides recovery for deaths caused by negligence as well as for deaths caused by unseaworthiness." Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* 368 (2d ed. 1975). *See also* 8 *Benedict on Admiralty*, § 5.04[A][1][c] ("To fill the gap left by DOHSA with respect to deaths caused by conduct within territorial waters, a general maritime law wrongful death remedy was created by the Supreme Court in *Moragne*, under which the action may be based on negligence or unseaworthiness."); Steven F. Friedell, *Searching for a Compass:*

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7. The *Yamaha* opinion makes this same point in a slightly different context. There the Court stated "If *Moragne*'s wrongful death action did not extend to nonseafarers like Natalie, one could hardly argue that *Moragne* displaced the state law remedies the Calhouns seek." *Yamaha*, 516 U.S. at 210 n.7.

Federal and State Law Making Authority in Admiralty, 57 La. L. Rev. 825, 835 (1997) ("[T]he holding in *Moragne* was not limited to unseaworthiness. The Court held that 'an action does lie under general maritime law for death caused by violation of maritime duties.' As recognized by the *Yamaha* Court, this encompasses not only unseaworthiness but also products liability and negligence.").

C. Post-*Moragne* decisions of the courts of appeals.

1. *The Second and Fifth Circuit Courts of Appeals have held that Moragne recognized a general maritime cause of action for wrongful death that includes negligence-based claims.*

The Second and Fifth Circuits (and the Texas Supreme Court[8]) have held that *Moragne* created a wrongful death cause of action premised on both negligence and unseaworthiness. *Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084, 1088-89 (2d Cir. 1993) ("In fashioning the remedy, however, the Supreme Court [in *Moragne*] did not limit the new right of recovery to unseaworthiness claims, but instead established a general remedy for wrongful death under maritime law."); *Miles v. Melrose*, 882 F.2d 976, 985 (5th Cir. 1989), *aff'd sub nom*, *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990).

Notwithstanding an earlier decision in *Ivy v. Security Barge Lines*, 606 F.2d 524, 527 (5th Cir. 1979) (holding that *Moragne* only created a general maritime cause of action for wrongful death based on unseaworthiness), the more recent Fifth Circuit decision in *Miles* held that *Moragne* "recognized a wrongful death action for negligence and unseaworthiness under general maritime law." *See Miles*, 882 F.2d at 985.[9] This Court's opinion

8. *General Chemical Corporation v. De La Lastra*, 852 S.W.2d 915 (Tex. 1993).

9. Also, prior to *Ivy* the Fifth Circuit assumed the existence of a *Moragne* cause of action for wrongful death premised on negligence in

(Cont'd)

upholding the Fifth Circuit's decision in *Miles*, while not expressly addressing the above-quoted sentence in the Fifth Circuit's opinion, strongly supports the conclusion that the wrongful death action recognized in *Moragne* is not limited to liability premised on unseaworthiness.

This Court's affirmance in *Miles* pointed to the unanimous enactment of state wrongful death statutes, The Jones Act, and DOHSA (all of which impose liability primarily on the basis of negligence) as having "established an unambiguous policy in abrogation of those principals that underlay *The Harrisburg* [which denied a general maritime wrongful death claim premised on negligence]. Such a policy is 'to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law.' " *Miles*, 498 U.S. at 23-24 (quoting *Moragne*, 398 U.S. at 391). The *Miles* Court went on to say that "the unanimous legislative judgment behind the Jones Act, DOHSA, and the many state statutes created a strong presumption in favor of a general maritime wrongful death action." *Id.* at 24.

This Court's opinion in *Miles* said nothing that would even hint that the general maritime wrongful death action recognized in *Moragne*, which embodied the "unanimous legislative judgment" of state and federal legislatures recognizing **negligence-based** wrongful death recoveries, was to be limited only to actions premised on the theory of unseaworthiness. *See also Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 214 n.11 (1996).

(Cont'd)
Thibodaux v. Atlantic Richfield Co., 580 F.2d 841, 842, 846 (5th Cir. 1978) and in *Law v. Sea Drilling Corp.*, 523 F.2d 793, 798 (5th Cir. 1975) ("No longer does one need a state remedy. No longer does one need a state court, or The Admiralty as a court, or DOHSA as a remedy. There is a federal maritime cause of action for death on navigable waters — any navigable waters — and it can be enforced in any court.")

Respondent contends that in light of *Miles* (and *Yamaha*), the decision in *Ivy v. Security Barge Lines, Inc.* 606 F.2d 524 (5th Cir. 1979) is no longer good law in the Fifth Circuit to the extent it can be read as restricting the wrongful death action to liability premised on unseaworthiness. Moreover, as the concurring opinion in *Garris* points out, the majority opinion in *Ivy* was premised on a concern that the plaintiff might obtain inconsistent double recoveries for the same injury under *Moragne* and the Jones Act. App. F (58a n.4). No such concern exists in this case as Garris has no wrongful death action available under the Jones Act, the LHWCA and possibly no action under the Virginia wrongful death statute.[10]

2. *The Fourth and Ninth Circuits have held that Moragne should be extended to recognize a wrongful death action based on negligence.*

The Fourth and Ninth Circuits have held that while *Moragne* only recognized a general maritime cause of action for wrongful death based on unseaworthiness, *Moragne* should be extended so as to recognize a negligence-based wrongful death action under general maritime law. *Garris v. Norshipco*, App. F (21a-49a), 210 F.3d 209, 211 (4th Cir. 2000); *Nelson v. United States*, 639 F.2d 469, 473 (9th Cir. 1980). Whether the Second, Fourth, Fifth and Ninth Circuits (and the Texas Supreme Court) arrive at their conclusion by extending *Moragne* or by simply applying *Moragne*, the result is the same — there is a general maritime cause of action for wrongful death caused by negligence.

3. *The Eleventh Circuit has recognized a negligence-based Moragne cause of action.*

Norshipco cites *Ford v. Wooten*, 681 F.2d 712, 716 (11th Cir. 1982) for the proposition that there is no *Moragne*

10. *See* Section III.B. of this Brief.

cause of action for wrongful death premised on negligence.[11] As the concurring opinion in *Garris* explained, in *Ford*, the Eleventh Circuit held that *Moragne* does not create a negligence-based wrongful death cause of action "where a cause of action exists for wrongful death under DOHSA [the Death on the High Seas Act]." App. F (57a). In *Ford* the court held that "at least where statutory remedies exist, we deem consistency with the federal remedial schemes to be more important than the somewhat limited loss of uniformity." *Id.* at 716. Unlike the present case, in *Ford* DOHSA provided plaintiff with a statutory wrongful death remedy.

More recently, and following *Yamaha*, the Eleventh Circuit has recognized that the *Moragne* cause of action is available where liability is premised on negligence. *In re Amtrak "Sunset Limited" Train Crash*, 121 F.3d 1421 (11th Cir. 1997) involved negligence claims arising out of the derailment of an Amtrak passenger train as it passed over a bridge spanning navigable waters in Alabama. Minutes before the train began crossing the bridge a tugboat ran into the bridge causing a portion of the railroad track to become misaligned. "Three locomotives, two passenger coaches, a crew dormitory car and a baggage car tumbled into the bayou, resulting in the deaths of forty seven persons on the train, numerous personal injuries and extensive property damage to the train and bridge." *Id.* at 1423. The district court, relying on *Yamaha*, determined that the wrongful death claims were governed by the Alabama wrongful death statute and not general maritime law. This determination by the district court was the main question presented on appeal. *Id.*

In analyzing this question the Court identified several substantial conflicts between the Alabama wrongful death

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11. Norshipco also cites to *Brown v. Brown*, 226 Va. 320, 327, 309 S.E.2d 586, 590 (1983), where Virginia Supreme Court held that "even after *Moragne*, there is no federal cause of action for the death of nonseamen in state territorial waters occasioned by negligence." (footnote omitted)

statute and substantive admiralty law including that federal maritime law requires that individual fault among tortfeasors be apportioned in collision and allision cases whereas under Alabama law apportionment of damages among joint tortfeasors is strictly forbidden. *Id.* The Court then noted that "[i]n sharp contrast to *Yamaha*, which was a products liability action arising from a recreational jet ski accident, the present action bears a substantial connection with traditional maritime activity." *Id.* at 1426. The Court found that:

> Embodied within the district court's reasoning is the assumption that *Yamaha*, by allowing state law remedies in that case, implicitly accepted as a necessary byproduct of its holding: that state wrongful death schemes would conflict with the general maritime law which ultimately must yield to state interests. The district court's interpretation of *Yamaha* is mistaken.

Id. at 1424 (footnote omitted). The Court further noted that *Yamaha*:

> [D]id not intend to wholly sacrifice long-standing admiralty principles at the altar of states' rights. To the contrary, in *Yamaha* the Court confined its holding "to the modest question whether it was *Moragne's* design to terminate recourse to state remedies," *id.* at 210 n. 8, but in answering that question in the negative, repeatedly urged that "[p]ermissible state regulation . . . must be consistent with federal maritime principles and policies, *id.* at 215 n. 13 (citing *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373-74 (1959)), such that "state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system," *id.* at 210 n. 8 (quoting *Romero*, 358 U.S. at 373).

Id. at 1424. The Court then concluded that the district court erred in applying the Alabama wrongful death statute to the wrongful deaths in the action and held that: "The plaintiffs in the wrongful death actions have available to them the remedies provided in *Moragne v. States Marine Lines*, 398 U.S. 375 (1970)." *Id.*

II.

THE GOAL OF PROMOTING UNIFORMITY IN THE APPLICATION OF FEDERAL ADMIRALTY LAW SUPPORTS THE CONCLUSION THAT THE *MORAGNE* CAUSE OF ACTION INCLUDES NEGLIGENCE-BASED WRONGFUL DEATH ACTIONS.

Both the Constitution's grant of power in Article III, section 2, and the Judiciary Act of 1789, have been interpreted as giving the federal courts, in the absence of some controlling federal statute, the authority and obligation to develop a uniform substantive body of law applicable to cases within the admiralty and maritime jurisdiction. *See Southern Pacific Co. v. Jensen*, 244 U.S. 205, 215 (1917); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164 (1920); *Moragne*, 398 U.S. at 401-02. The goal of promoting uniformity in federal admiralty law was the driving force behind the Court's decision in *Moragne*. *Offshore Logistics v. Tallentire*, 477 U.S. 207, 230 (1986). Aside from a misplaced desire to dredge up the wreckage of *The Harrisburg*, there is no legal, equitable or policy reason for general maritime negligence law to distinguish between fatal and non-fatal negligence claims. Such an unprincipled distinction will wreak havoc with the goal of promoting uniformity in the application of federal maritime law.

A. There is no logical reason for federal maritime law to distinguish between fatal and nonfatal injuries to maritime workers.

The odd distinction in maritime law between negligence resulting in death and negligence resulting in injury was created by *The Harrisburg* and existed up until the *Moragne* decision in 1970 (Norshipco contends it exists to this day). It spawned a confusing and often contradictory body of law as courts attempted to ameliorate the harshness of *The Harrisburg*, a decision that was "dubious even when rendered." *Moragne*, 398 U.S. at 378.[12] *See also Yamaha*, 516 U.S. at 206-07 and *Offshore Logistics*, 477 U.S. at 212 ("Unable to tolerate this archaism [the rule of *The Harrisburg*], some courts began to allow recovery for deaths within state territorial waters if an applicable state statute permitted such recovery"). The Court in *Moragne* believed that:

> Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts. E.g., *Hess v. United States*, 361 U.S. 314 (1960); *Goett v. Union Carbide Corp.*, 361 U.S. 340 (1960). Such uniformity not only will further the concerns of both of the 1920 Acts [Jones Act, DOHSA] but also will give effect to the constitutionality based principle that federal admiralty law should be "a system of law coextensive

12. The *Moragne* court found the *The Harrisburg*'s conclusion that there was no common law action for wrongful death "was based upon a particular set of factors that had, when *The Harrisburg* was decided, long since been thrown into discard even in England, and that had never existed in this country at all." *Id.* at 381.

> with, and operating uniformly in, the whole country." *The Lottawana*, 21 Wall. 558, 575, 22 L.Ed 654, 662 (1875).

Moragne, 398 U.S. at 401-02 (footnote omitted).

If Norshipco's position is accepted it will mean that the exact same parties, involved in the exact same maritime activities, in the exact same location (within federal admiralty jurisdiction), will be subject to either federal or state substantive law depending solely on whether the injured party lives or dies. This Court has confronted this issue before and concluded that there is no rational basis for general maritime law to distinguish between fatal and non-fatal injuries. *See American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 281 (1980) ("Within this single body of judge-formulated law, there is no apparent reason to differentiate between fatal and nonfatal injuries in authorizing the recovery of damages for loss of society").[13]

According to Norshipco, because Christopher Garris did not survive his fall his claim should be subject to the following complete defenses under Virginia law: (1) statutory employer immunity, (2) contributory negligence, and (3) assumption of risk. A shorter statute of limitations standard will apply to his claim under Virginia law and a different measure of damages will apply to his claim.[14] Had Christopher survived his fall, his

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13. The Court in *American Export Lines* also rejected this fatal/nonfatal distinction in another context when it observed that "if DOHSA does not pre-empt general maritime law where *fatalities* occur *within* territorial waters, it follows *a fortiori* that the Act does not exclude federal maritime law as a source of relief for *nonfatal* injuries upon the same waters". *Id.* at 282. The concurring opinion of Justice Powell in *American Export Lines* sums up the matter succinctly: "Because I see no rational basis for drawing a distinction between fatal and nonfatal injuries, I join in the judgment of the Court." *Id.* at 286.

14. Under *Moragne*, the estate of the deceased can recover damages for loss of support, services and society but not grief and (Cont'd)

negligence claim under the general maritime law would not be subject to any of these complete defenses or to the other less generous aspects of state law. *See Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 162-63 (1981); *Kermarec*, 358 U.S. at 628; *Pope & Talbot*, 346 U.S. at 409. *See also Yamaha*, 516 U.S. at 211-12.

In addition, according to Norshipco, had Christopher Garris been working aboard a ship in Portland, San Francisco, Houston, New Orleans or Miami, and fallen to his death under identical circumstances, his claim should rightly be subject to five different state tort law schemes. If uniformity is to continue to be a goal in the development of federal admiralty law then these types of inconsistencies should not be permitted by this Court.

There is simply no reason for this Court to perpetuate a distinction that arose due to a "dubious" 1886 opinion that itself "had little justification except in primitive English legal history — a history far removed form the American law of remedies for maritime death." *Moragne*, 398 U.S. at 379. In analyzing *The Harrisburg* opinion and its reliance on the common law rule against wrongful death claims, the *Moragne* Court observed that:

> One would expect, upon an inquiry into the sources of the common-law rule, to find a clear and compelling justification for what seems a striking departure from the result dictated by elementary principles in the law of remedies. Where existing law imposes a primary duty, violations of which are compensable if they cause injury, nothing in ordinary notions of justice suggests that a violation should be nonactionable simply because it was serious

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sorrow. *See Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974). Under the Virginia Wrongful Death statute, grief and sorrow are recoverable. Va. Code Ann. § 8.01-52(1)-(4).

> enough to cause death. On the contrary, that rule has been criticized ever since its inception, and described in such terms as "barbarous."

Moragne, 398 U.S. at 381.

B. The comparative negligence rule is a characteristic feature of maritime law that requires uniform application within admiralty jurisdiction.

Norshipco argues at p. 28 of its Brief that negligence is not a "characteristic feature" of admiralty law and therefore uniformity concerns do not support the recognition of a negligence-based wrongful death action under the general maritime law. This argument misses the mark for two reasons. First, as noted above, negligence has been actionable under the general maritime law since at least the *Blessing* decision in 1882. Second, the comparative negligence rule is a "characteristic feature" of the general maritime law of negligence and it is directly at odds with the "all or nothing" rule of contributory negligence" applied in Virginia and some other states.[15] *Moragne* specifically identified the comparative negligence rule as a peculiarly maritime concept:

> The incongruity of forcing the States to provide the sole remedy to effectuate duties that have no basis in state policy is highlighted in this case. The Florida

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15. For example, North Carolina also adheres to the "all or nothing" rule of contributory negligence. *Bowden v. Bell*, 446 S.E.2d 816 (N.C. Ct. App. 1994). South Carolina and Texas have adopted a modified comparative negligence rule that bars the plaintiff from any recovery if his negligence was more than 50% responsible for his injuries. *Nelson v. Concrete Supply Co.*, 399 S.E.2d 783 (S.C. 1991); Tex. Civ. Prac. & Rem. Code Ann. §§ 33.001, 33.012 (Vernon 2000). Oregon and Pennsylvania have adopted a different modified comparative negligence rule that bars a plaintiff's recovery if his negligence is greater than the combined fault of all other negligent actors. Or. Rev. Stat. § 18.470 (1999); Pa. CSA § 7102(a).

> Supreme Court ruled that the state wrongful death act was concerned only with "traditional common-law concepts," and not with "concepts peculiar to maritime law such as "unseaworthiness" **and the comparative negligence rule**.

Moragne, 398 U.S. at 402 n.15 (emphasis added). *See also Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 410 (1953).

Virginia continues to apply the "all or nothing rule" of contributory negligence which, if applied to maritime claims in Virginia waters, will certainly not "assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts." *Moragne, supra*, at 401-02. On the contrary, if Norshipco's position is accepted, there will be a three mile coastal zone in which maritime torts resulting in death may be governed by a defense that was rejected as violative of fundamental maritime principles as far back as 1890. *See The Max Morris v. Curry*, 137 U.S. 1 (1890) (rejecting contributory negligence as bar to recovery in maritime personal injury cases).

At this late date there can be no dispute that the comparative negligence rule is a fundamental tenet of substantive maritime law. *See Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 162-63 (1981) (contributory negligence and assumption of risk are inapplicable under maritime law). *The Max Morris*, 137 U.S. at 14; *The Lackawanna*, 151 F. 499 (S.D.N.Y. 1907) (adopting comparative negligence standard in maritime personal injury cases); 6 U.S.C. § 688 (adopting comparative negligence standard for Jones Act claims); 46 U.S.C. §§ 761-768 (adopting comparative negligence standard for DOSHA claims); *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975) (adopting pure comparative fault standard in cases of marine collision). *See generally Comparative Negligence in Maritime Personal Injury Cases*, 43 La. L. Rev. 941 (1983).

In *Yamaha* this Court noted that "in several contexts, we have recognized that vindication of maritime policies demanded uniform adherence to a federal rule of decision, with no leeway for variation or supplementation by state law." 516 U.S. at 210. The Court then cited as an example *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409 (1953) and its holding that admiralty's comparative negligence rule barred application of the state contributory negligence rule. *Id.* at 210.

The legislative history of the 1972 amendments to the LHWCA support this conclusion. In describing the third-party action authorized by § 905(b), Committees of both the Senate and House stated:

> [T]he Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law. In that connection, the Committee intends that **the admiralty concept of comparative negligence**, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to causing the injury.

H.R. Rep. No. 92-1441, (1972), *reprinted in* 1972 U.S.C.C.A.N. 4698, 4705 (emphasis added).

III.

FEDERALISM CONCERNS DO NOT JUSTIFY A REFUSAL TO RECOGNIZE A GENERAL MARITIME WRONGFUL DEATH ACTION BASED ON NEGLIGENCE.

A. Norshipco's argument that state law provides the only remedy to Garris is not an argument based on federalism concerns but a frontal attack on federal maritime jurisdiction.

1. *State law is not presumed supreme in state waters.*

Norshipco argues that recognition of a general maritime cause of action for wrongful death based on negligence "would trump Virginia's 'statutory employer' defense" and "impermissibly violate the state's right to regulate tortious conduct within state borders." Norshipco Brief at p. 23. This argument is based on an inverted view of what Justice Frankfurter referred to as "the highly intricate interplay" of federal and state competence within state waters. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373 (1959). *Yamaha* concluded that, at least for "nonseafarers," the *Moragne* cause of action did not preempt state wrongful death statutes within state waters. *Yamaha*, 516 U.S. at 216. Norshipco turns the *Yamaha* decision upside down when it argues that state wrongful death statutes, in effect, preempt general maritime law within state waters. It is not state law that enjoys presumptive supremacy in state waters. On the contrary, while state law is not automatically displaced within federal admiralty jurisdiction, "state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995). *See also Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953) (Pennsylvania's contributory negligence doctrine could not be applied to injured

worker's negligence claim under general maritime law); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986) (DOHSA savings clause that allows wrongful death actions in state courts for death on the high seas did not allow states to apply their substantive state wrongful death laws in derogation of admiralty DOSHA remedies); *Louisiana ex rel. Guste v. M/V Testbank*, 752 F. 2d 1019 (5th Cir. 1985) (state law giving economic loss damages was preempted by the general maritime law).

The LHWCA and the Virginia Worker's Compensation Act ("VWCA") have long overlapped each other in coverage,[16] however, the LHWCA has adopted a more restricted "statutory employer" immunity than the more generous immunity granted by the VWCA. This is not a "trumping" of state law. The state "statutory employer" immunity applies to state law claims whether under the VWCA, the Virginia Wrongful Death Statute, or general Virginia negligence law. *See Garvin v. Alumax of South Carolina, Inc.*, 787 F.2d 910 (4th Cir. 1986). The federal "statutory employer" immunity rule applies to federal claims under the LHWCA or general maritime negligence law. *See Roach v. M/V Aqua Grace*, 857 F.2d 1575, 1579 n.2 (11th Cir. 1988); *Ward v. Norfolk Shipbuilding and Drydock Corp.*, 770 F. Supp. 1118 (E.D. Va. 1991); *Mizenko v. Electric Motor & Contracting*, 244 Va. 152, 419 S.E.2d 637 (1992).

Congress could have left it to the various states to define the scope of the statutory employer defense under the LHWCA, but instead it opted for a uniform federal standard.[17] Given this

16. *See Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980) (endorsing overlapping coverage of state workers' compensation laws and the LHWCA).

17. In 1984, 33 U.S.C. § 905(a) was amended to make clear that a general contractor enjoys immunity from a third party suit for liability in tort only when the subcontractor-employer fails to secure compensation and the general contractor is forced to pay it. 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law*, § 7-10 (3d ed. 2001).

clear Congressional pronouncement that federal maritime uniformity is more important than allowing a state to project its "statutory employer" immunity into cases brought under federal maritime law, this Court need not engage in any guesswork as to whether the Virginia or federal "statutory employer" immunity should apply to claims brought under the general maritime law.

2. *The Virginia Supreme Court has concluded that uniformity concerns bar the application of Virginia's statutory employer immunity to federal maritime actions.*

The Virginia Supreme Court is certainly mindful of issues affecting Virginia sovereignty. Yet, the Virginia Supreme Court has also concluded that the VWCA "statutory employer" immunity cannot bar claims brought under the general maritime law that would not be barred under the LHWCA. *See Mizenko v. Electric Motor & Contracting*, 244 Va. 152, 419 S.E.2d 637 (1992) ("we hold that there is no state interest present in this case which outweighs the need for uniformity in the application of the general maritime law"); *see also Hunter v. Virginia International Terminals, Inc.*, 244 Va. IX, 419 S.E.2d 654, 655 (1992) (based on an evaluation of the comparative state and federal interests as set forth in *Mizenko*, the Virginia Supreme Court held that a maritime worker's general maritime negligence claim for injuries suffered aboard a barge on navigable waters could not be barred by application of the VWCA).

3. *Application of Virginia tort law concepts to Garris' claim would violate fundamental features of the general maritime law.*

The longstanding differences between general maritime negligence law and state negligence law are many and significant. As noted above, Virginia has steadfastly maintained its rule that a plaintiff's contributory negligence, no matter how

slight, is a complete bar to recover,[18] while federal maritime law rejected this rule in favor of comparative negligence over one hundred years ago.[19] This Court has strongly criticized the unfair results produced by the "all or nothing" rule of contributory negligence and the equal division of damages rule. *See United States v. Reliable Transfer Co.*, 421 U.S. 397, 405 (1975); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953).

The law in Virginia (and several other states) also retain legal concepts such as assumption of risk, last clear chance, different standards of care depending on whether someone is an invitee or licensee, etc.[20] and several states have enacted caps on certain types of damages such as punitive damages.[21] Federal maritime negligence law has rejected these concepts.[22] Also,

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18. *Litchford v. Hancock*, 232 Va. 496, 352 S.E.2d 335 (1987) (negligence of parties may not be compared, and any negligence of plaintiff which is proximate cause of accident will bar recovery).

19. *See The Max Morris v. Curry*, 137 U.S. 1 (1890) (holding contributory negligence does not bar recovery, but only mitigates damages, under maritime law); *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975) (adopting pure comparative fault standard).

20. *Cole v. Jenkins*, 34 F. Supp. 2d 381 (W.D. Va. 1998) (assumption of risk); *Williams v. Harrison*, 255 Va. 272, 497 S.E.2d 467 (1998) (last clear chance); *Franconia Associates v. Clark*, 250 Va. 444, 463 S.E.2d 670 (1995) (different standards of care owed to invitees and licensees).

21. Va. Code Ann. § 8.01-38.1.

22. *See Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 162-63 (1981); *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424 (1939); *National Marine Serv. Inc. v. Petroleum Serv. Corp.*, 736 F.2d 272 (5th Cir. 1984) (rejecting assumption of risk as defense under maritime law); *Prudential Lines, Inc. v. McAllister Bros., Inc.*, 801 F.2d 616 (2d Cir. 1986) (rejecting last clear chance doctrine as a defense under maritime law); *Kermarec v. Compagnie Gernerale* (Cont'd)

Virginia has a two year statute of limitations period for negligence and wrongful death actions and Congress has adopted a uniform three year statute of limitations period for all personal injury claims arising out of a maritime tort.[23] These differences affect a far greater number of cases than the cases involving Virginia's "statutory employer" immunity. It is clear that none of these state tort law concepts can be applied to federal maritime claims. Yet, Norshipco does not complain of this "trumping" of state law.

Such differences between state and federal law do not represent "violations of a state's right to regulate tortious conduct within state borders," (Norshipco Brief at p. 23) they merely reflect the fact that Congress and the federal courts are tasked by the Constitution to develop a uniform body of federal maritime law. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990); *Robins Dry Dock & Repair Co. v. Dahl*, 266 U.S. 449, 456-57 (1925) (state statute preempted where its application would interfere with commonly accepted maritime principle of comparative negligence). These differences also evidence a strong difference of opinion as to basic tenets of substantive tort law. Yet notwithstanding the obligation of Congress and the Federal Courts to develop a uniform body of federal admiralty law, Norshipco contends that these fundamental principles of substantive federal maritime law should give way to "the collective judgment of the 140-member General Assembly of Virginia." Norshipco Brief at p. 41.

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Transatlantique, 358 U.S. 625 (1959) (adopting uniform duty of care standard owed to persons lawfully aboard a vessel). As for punitive damages, one commentator has observed that "since punitive damages in admiralty are a matter of federal maritime law, state tort reforms do not affect admiralty punitive damage awards." 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law*, § 5-17 p. 228.

23. 46 U.S.C. § 763(a) (uniform three-year statute of limitations for marine torts).

Notwithstanding Norshipco's exaggerated warnings of violations of state sovereignty, since at least the *Blessing* decision in 1882 there has been this interplay between state and federal maritime tort law and a second Civil War has not yet erupted.

4. *Norshipco cloaks its result-oriented argument under the guise of federalism.*

For all of Norshipco's sound and fury concerning states' rights, it is really only concerned with the difference between federal and Virginia law as to the scope of "statutory employer" immunity. However, given Congress's clear direction on this issue, no matter what this Court decides, the "statutory employer" immunity of the LHWCA will continue to preempt the VWCA's "statutory employer" immunity within federal admiralty jurisdiction. *See Ward*, 770 F. Supp. at 1121 and *Mizenko*, 419 S.E.2d at 640-44. If Norshipco really means what it says about the paramount importance of protecting a state's right to regulate tortious conduct within its borders then provisions of the LHWCA and 120 years of maritime negligence law must be swept aside to avoid "violations" of state tort law. Norshipco's brief is careful not to ask so much, but there is no logical reason why the many above-described "violations" of Virginia's sovereignty should be any more palatable to Norshipco than the non-application of Virginia's "statutory employer" immunity for deaths caused by negligence in state waters.

On the other hand, if, as Garris suspects, Norshipco's concern for states' rights is limited to insuring the application of Virginia's broader "statutory employer" immunity to bar recovery in this case, then it is really arguing for a particular result and not states' rights. Thus, it is Norshipco, and not the Fourth Circuit, that is guilty of "result-oriented" reasoning. *See* Brief of Norshipco at p. 27.

5. *Recognition of a negligence-based wrongful death action will not undermine state wrongful death statutes.*

Norshipco recognizes, as it must, the power of Congress and the Federal Courts to promote a uniform body of federal maritime law. Brief of Norshipco at p. 27. However, Norshipco argues that "creating a new tort-based cause of action for harbor workers in state territorial waters would upset settled and predictable state rules under which maritime employers currently operate." Brief of Norshipco at p. 40. As for the "settled and predictable" state of the law, this case has made its way to this Court on Norshipco's argument that there is a "schizophrenic three-way split in the federal courts concerning whether *Moragne* recognizes or should be extended to recognize a judge-made, wrongful death cause of action in negligence." Pet. for Writ of Cert. at p. 5.

As noted earlier, the Second, Fourth, Fifth, Ninth and Eleventh Circuits recognize a general maritime wrongful death action based on negligence. While Norshipco will no doubt point to the *Ivy* and *Ford* decisions as casting doubt on the position of the Fifth and Eleventh Circuits, Norshipco cannot point to any state or federal jurisdiction except the Commonwealth of Virginia[24] that unequivocally limits *Moragne* to unseaworthiness claims. Assuming the most recent cases in the Fifth, Fourth and Eleventh Circuits can be relied upon, a *Moragne* cause of action for negligence now exists in Washington, Oregon, California, Texas, Louisiana, Mississippi, Alabama, Florida, Georgia, South Carolina, North Carolina, Virginia, Maryland, New York and Connecticut. These states represent the vast majority of the United States coastline and include the most active ports in the country. Norshipco does not explain how a decision by this Court that overturns the law in these jurisdictions better promotes predictability. In fact, the only predictable result of this Court

24. Of course, if the Fourth Circuit's decision in this case is upheld, the Virginia Supreme Court decision in *Brown v. Brown*, 226 Va. 320, 309 S.E.2d 586 (1983) will be overturned.

holding that there is no wrongful death action for negligence under the general maritime law, is that factually identical cases arising under federal maritime jurisdiction will be subject to as many different substantive state law tort schemes as there are states that include or border navigable waters.

Norshipco contends that recognition of a negligence-based general maritime wrongful death action will undermine state wrongful death statutes. Just the opposite is true. *Moragne* sought to give effect to the policies underlying the enactment of state wrongful death actions. In *Miles*, this Court recognized this goal of *Moragne* when it stated "the unanimous legislative judgment behind the Jones Act, DOSHA, and the many state statutes created a strong presumption in favor of a general maritime wrongful death statute." *Miles*, 498 U.S. at 24. Due to principles of uniformity and consistency necessary to the administration of federal maritime law, some minor inconsistencies will no doubt exist concerning the specifics of state wrongful death statutes and a general maritime wrongful death action. However, the overriding state policy of permitting a negligence-based cause of action for wrongful death is promoted by recognizing a general maritime negligence-based cause of action for wrongful death.

B. Following this Court's decision in *Yamaha* there may be no remedy under state wrongful death statutes for deaths of "seafarers".

Unmentioned in Norshipco's extended discourse on why state wrongful death statutes provide the sole remedy for workers like Christopher Garris who are killed in state waters, is the distinct possibility that in the wake of *Yamaha* only "non-seafarers" are permitted the application of state wrongful death statutes. In *Yamaha* this Court stated:

> Traditionally, state remedies have been applied in accident cases of this order — maritime wrongful death cases in which no federal statute specifies the

> appropriate relief and the decedent was not a seaman, longshore worker, or person otherwise engaged in a maritime trade. We hold . . . that state remedies remain applicable in such cases and have not been displaced by the federal maritime wrongful death action recognized in *Moragne*.

Yamaha, 398 U.S. at 202. It appears that Garris was a "seafarer" as defined by *Yamaha* as he was "a person otherwise engaged in a maritime trade" and he was covered by the LHWCA. *Id.* at 201, 205 n.2.

At least two cases have interpreted *Yamaha* as foreclosing "seafarers" from utilizing state wrongful death statutes. In *Ghotra v. Bandila Shipping, Inc.*, 113 F.3d 1050, 1058-60 (9th Cir. 1997) the court found that Ghotra, a self-employed marine surveyor killed aboard a ship in navigable waters, was a "seafarer" within the meaning of *Yamaha* and therefore state wrongful death remedies were preempted by federal maritime law. In *Ghotra* the decedent's family could still bring a federal wrongful death action against the vessel under 33 U.S.C. § 905(b). Likewise, in *In re Goose Creek Trawlers, Inc., Limitation Proceedings F/V Haley Clark*, 972 F. Supp. 946 (E.D.N.C. 1997), the Court found that Bruce Spain, a self-employed commercial shrimper, was a "seafarer" and interpreted *Yamaha* as holding that state wrongful death statutes are available only when decedent was not a seaman, longshore worker, or person otherwise engaged in a maritime trade. *Id.* at 950. In *Goose Creek* the court assumed decedent's estate could bring a federal wrongful death action for negligence under *Moragne*. *Id.* at 949.

If this court concludes that *Moragne* is dead and that these cases correctly interpret *Yamaha*, then the wrongful deaths of workers' such as Christopher Garris have ***no*** legal remedy. This Court will have thus managed to not only refloat *The Harrisburg*, but to iron-clad its unjustifiable inequities. While perhaps not

directly before this Court, the issues of who is a "seafarer"[25] and whether a "seafarer" is entitled to rely on state wrongful death statutes are inextricably linked to the issue of the existence or nonexistence of a general maritime wrongful death action based on negligence.

To the extent maritime workers are covered by a federal wrongful death action (whether by statute or under *Moragne*), one might try to justify foreclosing their access to state wrongful death actions. However, given the reasoning of *Moragne* and *Yamaha*'s assumption that the *Moragne* cause of action for negligence remains part of the general maritime law, it is impossible to believe that this Court considered, much less approved of, the possibility that maritime workers would again be left without any remedy in cases of wrongful death within state waters. Accordingly, the *Yamaha* Court had to believe that the *Moragne* cause of action for negligence-based wrongful death was alive and well.[26]

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25. In both *Ghotra* and *Goose Creek* the plaintiffs argued that the deceased were not "seafarers" within the meaning of *Yamaha* because they were self-employed and therefore not covered by any federal "comprehensive tort recovery regime" — meaning that Ghotra had no employer to pay benefits under the LHWCA and Spain had no employer he could bring a Jones Act claim against. Both courts rejected this argument. *See Yamaha*, 516 U.S. at 216. However, in *In re Goose Creek Trawlers, Inc.: Wards of the Court? With Friends Like These, Who Needs Enemies? Exploring the Nature of the Yamaha Exception*, 22 Tul. Mar. L.J. 693 (Summer 1998), the author argues that these cases are wrongly decided and that the *Yamaha* Court "intended that state remedies (*i.e.*, nonpecuniary damages) should remain available to all individuals who are not covered by a comprehensive federal statutory scheme"). *Id.* at 701-02.

26. The opinion in *Miles* also refutes Norshipco's contention that the *Moragne* cause of action died as a result of the 1972 Amendments to the LHWCA. In refusing to limit *Moragne* to its facts the Court stated: "Were we to limit *Moragne* to its facts, that case would no longer

(Cont'd)

IV.

THERE IS NO "SEPARATION OF POWERS" ISSUE INVOLVED WITH THE COURT'S RECOGNITION OF A GENERAL MARITIME WRONGFUL DEATH ACTION BASED ON NEGLIGENCE.

A. The 1972 Amendments to the LHWCA Did Not Sweep away the *Moragne* Cause of Action for Wrongful Death.

1. *The 1972 Amendments specifically preserved workers' right to bring negligence actions against third-parties.*

The "unbroken line of federal cases"[27] recognizing a maritime worker's right to bring negligence actions against third parties was not broken by the 1972 Amendments. In fact, it was specifically preserved in the amended statute. Section 933(a) provides:

> If on account of a disability or death for which compensation is payable under this chapter the person entitled to compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

The use of the terms "some person other than the employer" and "third person" make clear that such claims are not limited to vessel owners. *See May v. Transworld Drilling Co.*, 786 F.2d 1261 (5th Cir. 1986) (1972 Amendments preserve injured

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(Cont'd)
have any applicability at all. In 1972, Congress amended the [LHWCA] to bar any recovery from shipowners for the death or injury of a longshoreman or harbor worker resulting from breach of the duty of seaworthiness." 498 U.S. at 28.

27. *See Pope & Talbot, Inc. v. Hawn*, 346 U.S. at 414 n.6.

worker's preexisting right, under general maritime law, to recover for third-party negligence, but eliminates his right to bring actions against third parties based on unseaworthiness).

In *Drake v. Raymark Industries, Inc.*, 772 F.2d 1007, 1014 (1st Cir. 1985) the Court explained that:

> The maritime tort action for negligence was a feature of the common law of admiralty prior to *Sieracki-Ryan*, when one group of torts involving longshore workers, those committed on board a vessel lying in navigable waters, were excepted from the negligence standard and given strict liability treatment. Section 905(b) was enacted to bar this special treatment, and essentially returned the applicable law to its pre-*Sieracki* state, when negligence had to be proven to obtain damages from a vessel.

In *Ward v. Norshipco*, 770 F. Supp. 1118 (E.D. Va. 1991), a case involving facts similar to this case, a temporary worker was injured while performing tank cleaning services aboard a U.S. Navy vessel and he filed suit against Norshipco, the contractor hired to perform repairs upon the vessel. Norshipco in turn filed a third-party against the subcontractor that obtained the temporary worker. Norshipco acknowledged that both the Virginia Workers' Compensation Act ("VWCA") and the LHWCA covered plaintiff but argued that despite this overlapping coverage, the VWCA "statutory employer" immunity should apply to bar an action against Norshipco.[28]

28. The VWCA provides a broader "statutory employer" immunity than the LHWCA. Under the VWCA a contractor is immune from suit by a subcontractor's employee provided the subcontractor was performing the "normal work" of the contractor. *See* Va. Code §§ 65.1-30, -31, -40. *Farish v. Courion Industries, Inc.*, 722 F.2d 74, 78-80 (4th Cir. 1983). Under the LHWCA a contractor can only take (Cont'd)

The Court held that the LHWCA's "statutory employer" immunity applied due to federal preemption principles and in reliance on *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 410 (1953) in which the Court stated that "a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretive decisions of this Court." *Ward*, 770 F. Supp. at 1121.

The *Ward* Court then turned to the question of whether plaintiff had a federal cause of action against Norshipco:

> The ultimate issue in this case, then, is whether Ward has a federal maritime cause of action against Norshipco. As *Garvin* holds, the LHWCA does not of itself create a cause of action in favor of an employee against a third party, unless the third party is a vessel. [*Garvin v. Alumax of South Carolina, Inc.*, 787 F.2d 910 (4th Cir. 1985)]; *see* 33 U.S.C. § 933. Ward therefore may not rely on the LHWCA to provide him with a cause of action against Norshipco. But simply because the LHWCA does not create such a cause of action does not mean such a cause of action does not exist under federal maritime law. . . .
>
> The question therefore becomes, in the absence of a federal statutory cause of action for negligence against a non-vessel third party, and in the absence of a Supreme Court case creating such a cause of action in the way *Moragne* created a federal maritime cause of action, does a federal maritime

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(Cont'd)
advantage of the "statutory employer" immunity if it actually pays benefits to the injured employee of the subcontractor due to the subcontractor's failure to secure the payment of compensation required by 33 U.S.C. § 904. *See* 33 U.S.C. § 933(I).

> cause of action exist for a harbor worker against a non-vessel third party? The court holds that such a cause of action does exist.

Id. at 1121. *See also Holland v. Sea-Land Service*, 655 F.2d 556, 559 (4th Cir. 1981) (the 1972 amendments specifically "preserves [the employee's] right under prior law to recover for third-party negligence"). *Harville v. Johns-Manville Products Corp.*, 731 F.2d 775, 778 n.9 (11th Cir. 1984) (rather than creating a new cause of action, § 905(b) merely preserves certain preexisting remedies to injured workers against third parties). *See also Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706 (5th Cir. 1981); *Solano v. Beilby*, 761 F.2d 1369 (9th Cir. 1985). A leading admiralty law commentator agrees with these cases:

> Section 905(b) permits third party actions by an injured longshore worker only for "injuries caused by the negligence of a vessel." If the employee is injured by a non-vessel third party, such as a terminal operator, section 905(b) is not applicable. However, the employee may bring a tort action against a non-vessel third party. If there is admiralty jurisdiction under traditional tests, the cause of action will lie under the general maritime law.

Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 7-10 (3d ed. 2001).

2. ***The legislative history of the 1972 Amendments refutes Norshipco's argument that Congress intended to abrogate judge-made maritime negligence remedies.***

Norshipco's argument that the 1972 Amendments did away entirely with the *Moragne* cause of action is not supported by the language of those amendments or the legislative history concerning the amendments. The 1972 Amendments dealt with what one commentator called "the liability round robin" that

developed after this Court's opinions in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946) and *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). *See* Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 7-10 (3d ed. 2001).

When the LHWCA was passed in 1927, it created a no-fault compensation scheme for longshoreman and harbor workers and their employers. It also codified a cause of action for negligence by such workers against vessel owners. *See* 33 U.S.C. § 905(b). Later in *Sieracki*, 328 U.S. 85, the Supreme Court extended the warranty of seaworthiness to longshoreman who were aboard a ship doing seaman's work. Then, in *Ryan Stevedoring Co.*, 350 U.S. 124 (1956), the Supreme Court found an implied warranty of workmanlike performance running from the stevedore to the vessel owner. This set off the "liability 'round robin' whereby an injured longshoreman could recover damages for unseaworthiness from the shipowner, but the shipowner could proceed against the stevedore for indemnity because of breach of the implied warranty of workmanlike performance." Thomas J. Schoenbaum, *Admiralty and Maritime Law*, 2d ed., Vol. 1 at 434. The 1972 Amendments sought to eliminate this problem by abolishing the *Sieracki* cause of action for unseaworthiness against vessel owners *and* the indemnity action created by *Ryan* in favor of vessel owners against the stevedore. The 1972 Amendments did not address the liability of non-vessel third parties because they were not part of the problem Congress sought to correct.

The Senate and House Committee Reports on the amendments described the effect of the amendments as follows:

> Since 1946, due to a number of decisions by the U.S. Supreme Court, it has been possible for an injured longshoreman to avail himself of the benefits of the Longshoremen's and Harbor Workers' Compensation Act and to sue the owner of the ship on which he was working for damages as a result of

his injury. The Supreme Court has ruled that ship owner, under the doctrine of seaworthiness, was liable for damages caused by any injury regardless of fault. In addition, shipping companies generally have succeeded in recovering the damages for which they are held liable to injured longshoremen from the stevedore on theories of express or implied warranty, thereby transferring their liability to the stevedore company, the actual employer of the longshoremen.

The social costs of these law suits, the delays, crowding of court calendars and the need to pay for lawyers' services have seldom resulted in actual benefits for injured workers.

For a number of years representatives of the employees have attempted to have benefit levels under the Act raised so that injured workers would be properly protected by the Act. At the same time, employer groups indicated their willingness to increase such payments but indicated they could do so only if the Longshoremen's and Harbor Workers' Compensation Act were to again become the exclusive remedy against the stevedore as had been intended since its passage in 1927 until modified by various Supreme Court decisions.

The bill reported by the committee meets these objections by specifically eliminating suits against vessels brought for injuries to longshoremen under the doctrine of seaworthiness and outlawing indemnification actions and "hold harmless" or indemnity agreements. ***It continues to allow suits against vessels or other third parties for negligence.*** At the same time it raises benefits to a level

> commensurate with present day salaries and with the needs of injured workers whose sole support will be payments under the Act.

S. Rep. 92-1125, (emphasis added). In *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 617 n.41 (1981), this Court recognized that the amendments to the LHWCA left intact an employee's right to bring third-party actions.

In support of its argument that Congress intended by the 1972 Amendments of the LHWCA to do away with the *Moragne* remedy[29] and to limit "land based maritime workers to state law remedies," Norshipco quotes at two sections of its brief (pp. 22, 32) legislative history found in H.R. Rep. No. 92-1441 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4698, 4703:

> The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, in so far as bringing a third-party action is concerned . . .

However, this language did not intend to limit maritime workers to state law remedies. Indeed just the opposite was intended.

The above Committee Report merely expressed the intent that the negligence action set forth in § 905(b) against the vessel, be it for death or injury,[30] is to be governed by land based principles of law, *see Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 165 n.13, 168 n.14 (1981), but not the particular law of the state where the accident or death occurred.

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29. It is worth noting that the *Moragne* cause of action for unseaworthiness is still available to seaman. *See Miles*, 498 U.S. at 30.

30. As noted previously, the § 905(b) remedy applies to both death and injury cases. *See* §§ 905(b) and 902(2).

In this same House Report (No. 92-1441), the following dispositive language appears:

> Finally, the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law.

1972 U.S.C.C.A.N. at 4705. The language quoted above is also found in the Senate Committee Report, No. 92-1125, "Elimination of Unseaworthiness Remedy." In *Duty v. East Coast Tender Service, Inc.*, 660 F.2d 933 (4th Cir. 1981), the court reviewed this legislative history and concluded:

> In short, the objective has been to avoid a situation in which a plaintiff would have a viable cause of action in Portland, Maine although, under exactly identical factual circumstances, he would be unable to recover in Portland, Oregon because of differences in the laws of the two states. That is not to say that the state's law might not constitute persuasive authority as to what the federal law should be.

Id. at 938-39.

Norshipco must acknowledge that the LHWCA provides longshoremen and harbor workers with a federal claim for injury and death against a vessel under § 905(b), and the general maritime law provides longshoremen and harbor workers with a federal negligence claim for injury against a non-vessel. However, Norshipco contends that the LHWCA should be read to bar a federal claim for death against a non-vessel. This argument finds no support in the language of the LHWCA and

is refuted by the legislative history of the 1972 Amendments. Aside from the historical anomaly created by *The Harrisburg*, there appears no reason why the death of a harbor worker caused by the negligence of a non-vessel third-party should be set apart and limited solely to state law remedies.

3. *The LHWCA evinces no hostility toward judge-made general maritime negligence actions.*

Norshipco's "separation of powers" argument is premised on its badly mistaken interpretation of the legislative history surrounding the 1972 Amendments. From its misreading of the legislative history, Norshipco proceeds to pronounce that "Congress expressed its intention in the legislative history of the 1972 Amendments that general judge-made admiralty remedies should not supplement the LHWCA or existing state law remedies." Norshipco Brief at p. 32. In fact, as noted above, Congress expressed the exact opposite intent with regard to negligence actions. *See* Section IV.A. of this Brief.

Norshipco is simply wrong when it contends that "Congress rejected in the LHWCA a uniform tort remedy for harbor workers killed in state waters and instead opted for a no-fault worker's compensation remedy that harbor workers could assert against their employers." Norshipco Brief at p. 31. Section 933(a) of the LHWCA makes clear that a worker does not have to elect between accepting statutory benefits and pursuing a third-party negligence action. In addition, § 905(b) provides longshoreman and harbor workers with a cause of action against third-party vessels for negligence resulting in injury or death.[31] There is nothing in the statute or the legislative history to support Norshipco's contention that Congress meant to carve out and abolish third-party actions against non-vessels for wrongful death.

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31. 33 U.S.C § 905(b) refers only to "injury" however "injury" is defined at § 902(2) to include death.

Even if Congress had remained silent as to whether third-party negligence actions survived the 1972 Amendments, Norshipco's argument would still fail. A similar argument was made and rejected in *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975):

> Finally, the respondent suggests that the creation of a new rule of damages in maritime collision cases is a task for Congress and not for this Court. But the Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime, and "Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law." *Fitzgerald v. United States Lines, Co.*, 374 U.S. 16, 20 (1963) *See also Moragne v. United States Marine Lines*, 398 U.S. 375, 405 n.17 (1970); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630-632 (1959).

Id. at 409. Also, in *Moragne* the Court noted: "There should be no presumption that Congress has removed this Court's traditional responsibility to vindicate the policies of maritime law by ceding that function exclusively to the States." *Moragne*, 398 U.S. at 396.

B. DOHSA does not demonstrate any Congressional intention to preempt judge-made general maritime negligence claims in state waters.

Norshipco next argues that because Congress, in enacting DOHSA, did not intend to preempt state wrongful death statutes within state waters, it follows that Congress meant to "reserve this area of law to the States." Norshipco Brief at p. 20. *Moragne* specifically rejected this very argument: "We conclude that the Death on the High Seas Act was not intended to preclude the availability of a remedy for wrongful death under general maritime law in situations not covered by the Act." *Moragne*,

398 U.S. at 402. In *American Export Lines, Inc. v. Alvez*, defendant also argued that DOHSA preempted general maritime law within state waters. The Court disagreed explaining:

> DOHSA comprehends relief for *fatal* injuries incurred on the *high seas*, 46 U.S.C. § 761. To be sure, *Mobil Oil Corp. v. Higginbotham* [436 U.S. 618 (1978)], construed DOHSA to forbid general maritime law supplementation of the elements of compensation for which the Act provides. But *Higginbotham* never intimated that the preclusive effect of DOHSA extends beyond the statute's ambit. To the contrary, while treating the statutory remedies for wrongful deaths on the high seas as exclusive, *Higginbotham* expressly reaffirmed that *Gaudet* governs recoveries for wrongful deaths on territorial waters. 436 U.S. at 623-625; see *Moragne*, 398 U.S. at 397-398.

446 U.S. at 282.

In *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990) this Court echoed *Moragne's* conclusion that Congress in passing DOHSA [and the Jones Act], did not intend to foreclose the Supreme Court from "supplement[ing] these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must keep strictly within the limits imposed by Congress." *Id.* at 27. There, the defendant, Apex Marine, argued that because the decedent was a seaman and not a longshoreman like Moragne, the *Moragne* cause of action did not apply. The *Miles* Court stated: "Apex is correct that *Moragne* does not apply on its facts, but we decline to limit *Moragne* to its facts." *Id. Miles* reaffirmed the conclusion of the *Moragne* Court that "the extension of the DOHSA wrongful death action to territorial waters furthers, rather than hinders, uniformity in the exercise of admiralty

jurisdiction." *Id.* at 29-30. *See also* App. F (45a); *Garris v. Norfolk, Shipbuilding & Drydock Company, Inc.*, 210 F.3d 209, 221 (2000).

CONCLUSION

In 1865, Chief Justice Chase, while sitting as district judge in his circuit, recognized a wrongful death action based on negligence under the general maritime law stating: "It better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." *The Sea Gull*, 21 F. Cas. 909, 910 (CC Md. 1865) (No. 12,578). In 1886, the Court in *The Harrisburg* failed to heed this humane and commonsensical advice and instead adopted a harsh, contorted and long since rejected legal rule barring such claims. This misguided decision led to eighty-four years of unnecessary confusion as the courts attempted to circumvent the harshness of the rule announced in *The Harrisburg*. Then, in 1970, in the "unanimous and carefully crafted" decision in *Moragne* (*Miles*, 498 U.S. at 29), this Court finally overturned *The Harrisburg* and adopted the reasoning of Chief Justice Chase. Most courts and commentators (including the Supreme Court, it would seem) believed that *Moragne* created (or should be extended to create) a general maritime cause of action for wrongful death. *See* cases and authorities cited in Sections I.B. and C. *infra*; *see also Yamaha*, 516 U.S. at 214 n.11.

This Court is now asked to pronounce *Moragne* dead and to return to the confused state of the law caused by *The Harrisburg*. This Court should decline this request and should instead state clearly and unequivocally that there is an action for wrongful death under the general maritime law and it encompasses not only unseaworthiness but all maritime duties, including negligence.

Respectfully submitted,

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IN THE

Supreme Court of the United States

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION,

Petitioner,

v.

CELESTINE GARRIS, ADMINISTRATRIX OF THE ESTATE OF CHRISTOPHER GARRIS, DECEASED,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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CORPORATE DISCLOSURE STATEMENT

Petitioner's corporate disclosure statement was set forth at page *ii* of its Brief on the Merits, and there are no amendments to that statement.

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Other Authority:

Professor Robert Force, *Choice of Law in Admiralty Cases: "National Interests" and the Admiralty Clause*, 75 Tul. L. Rev. (forthcoming June, 2001) 8

ARGUMENT

Preliminary

This case requires this Court to determine how many causes of action a harbor worker's estate/survivors have for wrongful death. Congress has provided a no fault remedy (LHWCA[1]) which plaintiff has already exercised and an action, based on negligence, against any vessel. 33 U.S.C. § 905(b). Also, state remedies provided *via* wrongful death/survival statutes and worker's compensation systems are available and often more generous. Plaintiff now asks this Court to infer/create another federal remedy based on negligence solely to circumvent application of one state's "statutory employer" defense to a state wrongful death claim.

Congress has not provided such remedy and neither should this Court.

A. Plaintiff's Uniformity For The Sake Of Uniformity Argument

Uniformity, plaintiff's "support" for extending *Moragne* and discarding this Court's decisions applying state statutes to the deaths of non-seamen,[2] is the crux of this case. The question, the answer to which is here dispositive, is whether uniformity requires the creation of a judge-made national law for the wrongful death of non-seamen in territorial waters — under circumstances where no responsibility is attributable to the vessel.

The point controlling is that the proposed cause of action is not necessary to preserve the national interest underlying the

1. 33 U.S.C. § 901, *et seq.* (1994).

2. *Tungus v. Skovgaard*, 358 U.S. 588, 590-94 (1959); *Western Fuel v. Garcia*, 257 U.S. 233, 241-42 (1921); *Old Dominion S.S. Co. v. Gilmore*, 207 U.S. 398, 404-07 (1907); *Sherlock v. Alling*, 93 U.S. 99, 104 (1876).

Admiralty Clause. Uniformity is required only when necessary to promote and protect the commercial interests of the nation as a single economic unit. The mission of this Court, as granted by Article III, Section 2 of the Constitution and defined in the Federalist Papers (see Justice Kennedy's comments, p.7 *infra*) is not to homogenize maritime law. Uniformity for uniformity's sake is not the rule.

Uniformity does not require that the law applicable to the death of Mr. Garris be the same as that which would have applied had his injuries[3] not been fatal. As this Court explained in *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996), *Moragne* created a new maritime cause of action because of very specific uniformity concerns which are not here present. *Moragne* was not concerned with variations in state remedies; *Moragne* was concerned with a distinctly maritime concept, *i.e.*, unseaworthiness, which required uniform application for harmony in international and interstate relations. The *Yamaha* court stated "[t]he uniformity concern that drove our decision in *Moragne* related . . . to the availability of unseaworthiness as a basis of liability."[4] 516 U.S. at 211.

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3. It is mere happenstance that federal law (general maritime law) would apply had Mr. Garris' injuries not been fatal. It is mere happenstance that Mr. Garris was physically on the vessel when struck by a land-based apparatus. If Mr. Garris had not yet boarded the vessel, or if he had deboarded to do preparatory work and been struck while physically on the land, Virginia law would cover a claim for personal injuries as well as the wrongful death claim.

4. *Moragne* was concerned only with a so-called "*Sieracki* seaman," a longshoreman working aboard a ship in state waters, to whom an unseaworthiness remedy had been extended for personal injuries. As a result of the 1972 amendment of the LHWCA (33 U.S.C. § 905(b)) ("liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness") and this

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This Court's application of state law to wrongful deaths occurring within territorial waters is the consequence of the common law rule that personal actions do not survive death, Congress' decision to limit DOHSA to the high seas and not intrude upon state sovereignty and the reality that states are more concerned, than is the national government, with familial and other local issues. States, which may well bear the financial burdens thrust upon them by those survivors who become state charges, are particularly well positioned to identify those who should benefit from the wrongful death action and identify and quantify those benefits.

The concept of uniformity has been most commonly applied in cases where the issue has been preclusion. Those cases make plain that uniformity is not inflexible or absolute. *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 323-24 (1955), (Frankfurter, J., concurring). Uniformity must be defined in the context of and within the parameters set by its origins. Article III, Section 2 of the Constitution, the Admiralty Clause, was a response to the concern that the several states, acting independently, might impede international and interstate commerce. It is when state law is disruptive of harmonious commerce that it must yield to federal law. *Romero v. International Terminal Operating Company*, 358 U.S. 354, 373-74 (1959).

Stated another way, the lure of certainty and symmetry is superficially appealing but incompatible with the highly intricate interplay of state and national governments in the regulation of maritime commerce.

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Court's decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), the remedy for unseaworthiness is now available only to seamen and only, of course, against a vessel or its owner.

If, as plaintiff urges, rigid uniformity were the goal, this Court would require a single uniform body of substantive law applicable to all cases within admiralty jurisdiction. That, however, has never been the case. *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 322 (1955) (the interests of shipping in its national and international aspects are substantially unconcerned with enforcement of a marine insurance clause); *Madruga v. Superior Court*, 346 U.S. 556, 562-63 (1954) (application of state law to an action for partition and forced sale of a vessel will cause no possible injury to commerce or navigation); *James Stewart & Co. v. Rivara*, 274 U.S. 614, 617 (1927) (application of New York conditional sales law does not "interfere with the use of . . . vessels as instrumentalities of interstate commerce"); *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 124 (1924) (application of a state arbitration statute does not adversely affect the characteristic features of uniformity of general maritime law); *Western Fuel v. Garcia*, 257 U.S. 233, 242 (1921) (application of state statute to an action for death of a longshoreman "will not work material prejudice to the characteristic features of general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations").

This analysis is consistent with the test for federal preclusion of state law established in *South Pacific Co. v. Jensen*, 244 U.S. 205, 216-17 (1917).

Two of the three prongs of the *Jensen* preclusion test have nothing to do with the instant case where there is no existing federal cause of action against negligent third parties. Virginia law does not conflict with any congressional enactment. Virginia law does not materially prejudice "the characteristic features of maritime law." A material characteristic is one which "originated in admiralty" or "has exclusive application " in

admiralty (*American Dredging Co. v. Miller*, 510 U.S. 443, 450 (1994)); wrongful death actions are not peculiar to and certainly did not originate in maritime law.

That leaves the third prong: preclusion is required where state law "interferes . . . with the proper harmony and uniformity of [general maritime law] *in its international and interstate relations*" (emphasis supplied). *Jensen*, 244 U.S. at 216.

Jensen's ruling, viewed within the context of its facts, is consistent with that court's identification, *via* the third prong, of the limited circumstances upon which uniformity is required. Application of the New York Worker's Compensation law would have implicated *vessel liability* and vessel liability, like seaworthiness[5], is a maritime concept, endemic to the sea and thus crucial to international/interstate commercial harmony. The decedent, a longshoreman, worked for an out of state corporation *which owned and operated the ship* decedent had been unloading. *The vessel was thus acting as its own stevedoring company*. The workers' compensation obligation of plaintiff's employer, the stevedoring company, *would have been the liability of the vessel*. The court explained that, "[i]f New York *can subject foreign ships* coming into her ports to [workers' compensation] obligations," that would be destructive of uniformity as it would interfere with freedom of navigation between states and with foreign countries. 244 U.S. at 217.

Stated another way, state law interferes "with the proper harmony and uniformity of [general maritime law] in its international and interstate relations" when state law has extraterritorial impact. *United States v. Locke*, 529 U.S. 89 (2000), and *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961),

5. The duty to furnish a seaworthy vessel is a federal one. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 627 (1978) (Marshall, J. dissenting); *Moragne v. State's Marine Lines, Inc.*, 398 U.S. 375, 395-96 (1970).

illustrate that disruption of commerce is the linchpin. In *Locke*, certain of Washington state's oil tanker regulations intruded in an area where there had been a history of significant federal presence and additionally would compromise uniformity because, *inter alia*, vessel masters would be required to learn and comply with the regulations of each port they might visit. In *Kossick*, a contract between a seaman and his employer on the subject of medical treatment was deemed a matter of national concern; a dispute could arise anywhere in the world and the contract obligation must be uniformly construed. The impact of state law in each case was extraterritorial.

American Dredging Co. v. Miller, 510 U.S. 443 (1994), a case cited throughout defendant's opening brief *but to which plaintiff offers no response*, supports this analysis. Indeed, all members of the *American Dredging* court — that is, the majority, the justices concurring and those dissenting — agreed upon the appropriate standard. Although the members of this Court reached contrary conclusions as to whether Louisiana's open forum statute, which precludes application of *forum non conveniens* to certain maritime litigation, adversely impacts uniformity, all agreed that uniformity is commerce-based and that law which has no extraterritorial effect does not interfere with harmony and uniformity of maritime law.

The majority viewed the statute as procedural and thus not an obstruction to maritime commerce: "maritime commerce in general does not require a uniform rule of *forum non conveniens.*[6]" (510 U.S. 443, 451-52) In his concurring opinion,

6. Justice Scalia indicated that in his view impairment of commerce is not the unifying theme in deciding issues of preemption but the fundamental question is "whether the state had the power to regulate the matter in the first instance." (510 U.S. 452 n.3) In that respect, this Court, by an unbroken line of cases, has acknowledged the power and interest of the states in applying their statutes to wrongful deaths occurring in territorial waters.

Justice Stevens noted that commerce is the guiding concern. 510 U.S. 443, 459-61 (Stevens, J., concurring) Commerce was also the touchstone of the dissent by Justices Kennedy and Thomas, who opined that Louisiana's denial of the defense of *forum non conveniens* in a maritime case "upsets international and interstate comity and obstructs maritime trade" — because a ship and its crew could be held in an American port to which they may have come for no reason other than refueling. 510 U.S. 443, 463-64.

The dissent, authored by Justice Kennedy, proffers an analytical framework for resolution of the issue. The Court must assess the importance of uniformity to maritime interests, analyzing that importance in light of the Admiralty Clause and consider, in the name of comity, the state interests to be promoted:

> Comity with other nations and among the States was a primary aim of the Constitution. At the time of the framing, it was essential that our prospective foreign trading partners know that the United States would uphold its treaties, respect the general maritime law, and refrain from erecting barriers to commerce. The individual States needed similar assurances from each other. See The Federalist, No. 22, pp143-145 (C. Rossiter ed 1961) (Hamilton); Madison, Vices of the Political System of the United States, 2 Writings of James Madison 362-363 (G. Hunt ed 1901). Federal admiralty and maritime jurisdiction was the solution. See 2 J. Story, Commentaries on the Constitution of the United States § 1672 (5th ed 1833); The Federalist No. 80, *supra*, at 478 (Hamilton) . . . "The confusion and difficulty, if vessels were compelled to comply with the local statutes at every port, are not difficult to

> see . . . [T]he Union was formed with the very definite design of freeing maritime commerce from intolerable restrictions incident to such control." *Washington v. W. C. Dawson & Co.*, 264 U.S. 219, 228, 68 L Ed 646, 44 S. Ct. 302 (1924). Accord, the *Lottawanna*, 21 Wall. 558, 575, 22 L Ed 654 (1875); *Jensen* 244 U. S. at 215-217, 61 L Ed 1086, 37 S. Ct. 524.

510 U.S. 443, 466-67.

This analysis is consistent with the "national interest" test Professor Robert Force has suggested to determine the substantive law applicable in admiralty cases. In his article, which has been accepted for publication, *Choice of Law in Admiralty Cases: "National Interests" and the Admiralty Clause*, 75 Tul. L. Rev. (forthcoming June, 2001) (manuscript at 59, on file with author)[7], Professor Force states:

> [I]t is submitted that the proposed "national interest" test has one additional advantage over the present approach to choice of law, that is, it provides a constitutional and principled basis for preempting state law. By deriving the meaning of the term "national interests" from the Admiralty Clause of the Constitution, and requiring that "national interests" serve as the point of departure in determining whether or not uniformity shall prevail, courts can better deal with the federalism issue. Outside of the admiralty area, federal law can oust state law only where some national interest embraced within the Constitution justifies it. The same approach should apply in admiralty cases.

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7. Copies of the article have been provided to respondent's counsel and lodged with the Clerk of this Court.

> It is difficult to assert that the Admiralty Clause requires uniformity of admiralty and maritime law in all respects because there already has been much accommodation of state law. On the other hand, it seems more principled to conclude that admiralty and maritime law must be uniform when such uniformity promotes or protects interests that underlie the Admiralty Clause. The Admiralty Clause and the interest embodied within it provide the necessary accommodation of state interests.

In a nutshell, it is not enough to assert that creation of a federal cause of action would promote oneness of law. Absent a compelling national interest requiring uniformity, the issue reduces to one of comity. National interest is marginal and there is no reason to doubt that Virginia can adequately protect the interests of its own citizens. Virginia law will not upset relations with the state or nation from which the vessel hailed. It will not impede commercial transactions or embarrass relations between this country and its trading partners.

B. The Authorities Which Invoke Uniformity To Extend *Moragne*

The Fourth Circuit below and the Ninth Circuit (*Nelson v. United States*, 639 F.2d 469 (9th Cir. 1980)) invoked but provided no analysis of uniformity. Neither gave reason why uniformity, their professed support for extending *Moragne*, is required where the death occurred in navigable but state waters which Congress declined to invade in enacting DOHSA; the decedent was a Virginia resident, working in Virginia; the alleged tortfeasors are local businesses; decedent was not a seaman and thus not one who might by "happenstance" have sustained his fatal injuries in New York, Louisiana or anywhere other than in his home state and vessel liability is not implicated.

Defendant respectfully submits that the Fourth and Ninth Circuits have misconstrued uniformity. Defendant asks this Court to consider the analysis of the highest court of New York, which is markedly parallel to Justice Kennedy's analysis in *American Dredging*, considered *supra*, and which provides a standard consistent with constitutional objectives.

Cammon v. City of New York, 2000 N.Y. LEXIS 3902, *12 (N.Y. 2000), held that uniformity does not require the application of federal law. The court instead applied a New York labor law which provided the plaintiff, an injured longshoreman, with a right of action sounding in strict liability. The circumstances were similar to those before this Court, with two notable exceptions: the sea played an active part in causing the *Cammon* plaintiff's injuries (*Id.* at *1); also, a national law is, of course, in place on the subject of injuries in territorial waters. The *Cammon* plaintiff was engaged in repairing a fender system designed to protect a pier from the impact of vessels leaving and entering the area. He had been working on a floating stage, assisted by a crane, which was positioned on a moored construction barge. In contrast to the instant case, where the crane was located on the pier, the *Cammon* crane was vulnerable to and affected by wave turbulence. The sea caused a 200 pound piece of timber which was suspended on the crane's boom, to swing wildly, striking plaintiff. *Id.* at *2-3.

The Court of Appeals held that no federal interest was directly implicated and there thus was no compelling need for uniformity. The court could give effect to the law of New York, which has a compelling interest in regulating construction practices within its borders, without interfering with "the free flow of maritime commerce." 2000 N.Y. LEXIS 3902, *12. In a word, the effect of applying New York law would not be "extraterritorial." The court stated: "[l]ocal regulations that do not affect vessel operations but rather govern liability issues

with respect to landowners and contractors within the State, have no extraterritorial effect." 2000 N.Y. LEXIS 3902, *9. *Accord*: *Inland Boatmen's Union v. Dept. of Transp.*, 836 P.2d 823, 829, 1993 AMC 479, 485 (Wash. 1992).

One further point. Even the cases cited by the *Cammon* dissent are consistent with the majority's concept of "extraterritorial effect." *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953), and *Chelentis v. Luckenbach Steamship Co.*, 247 U.S. 372 (1918), both of which involved injury claims, focused upon the impact local law would have upon international/ interstate commerce. The claim of the plaintiff in *Pope & Talbot* was directed against the vessel. 346 U.S. at 407. The claim of the plaintiff in *Chelentis* would, if governed by state law, likewise directly impact navigation and commerce: the injuries were allegedly caused by the vessel's superior officer. 247 U.S. 372, 378-79. Thus the *Chelentis* court concluded that application of national law was necessary to preclude defeat of the " 'uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states.' " 247 U.S. 372, 382.

In sum, uniformity, the professed reason for extending *Moragne*, does not withstand scrutiny. The Fourth Circuit's obligatory, but passing, reference to uniformity[8] notwithstanding, the court's decision, in fact, was result-oriented. The court's own words betray the real basis for the decision:

> We see no reason to deny Garris a basis of recovery simply because her son was a harbor worker who

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8. ". . . recognition of a general maritime law cause of action for wrongful death based upon negligence 'effectuate[s] the policies of general maritime law' because it is consistent with the policy of achieving uniformity in admiralty law." 210 F.3d 209, 221 (quoting *Moragne*, 398 U.S. 375, 400).

> died in Virginia, as opposed to another state that permits recovery against contractors. App. 45a

Sympathy is no basis for *jurisprudential* analysis. The concern of this Court is the application of constitutional and statutory principles — and not with reaching a particular result. *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 215-16 (1971).

Moreover, sympathy is an unstable compass: the direction to which it points varies as does a weathervane. Presumably if Mr. Garris lived and worked in another seaport city where death benefits were more generous and the bases of recovery more beneficial than those of the proposed, but yet undefined, new general maritime cause of action, the result reached by the Fourth Circuit would have been different.

C. Plaintiff's Assertion That *Moragne* Has Already Decided The Issue

Plaintiff, bereft of a compelling need for uniformity, retreats to quarreling with this Court's grant of review, asserting *Moragne* created a general cause of action in negligence. Plaintiff's rationale is simplistic: plaintiff in *Harrisburg* alleged negligence; *Moragne* overruled *Harrisburg*; *ergo, Moragne* created a cause of action sounding in negligence.

The Harrisburg did not focus upon negligence but upon the common law rule that no civil action of a personal nature survives death. That is an analysis applicable to all wrongful death claims and it was for that reason that *Moragne* was required to overrule rather than distinguish *The Harrisburg*. (*See* Fourth Circuit's analysis at App. 39A n.7) Also, negligence was not before the *Moragne* court. The subject was unseaworthiness and the court decided the issue before it — nothing more. Finally, unseaworthiness, like vessel negligence

(the subject of *The Harrisburg*) is a distinctly maritime concept.[9] There was a compelling need for uniformity requiring the creation of the *Moragne* cause of action because concepts, which are distinctly maritime, necessarily have extraterritorial effect. Thus, as this Court noted in *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 213 (1996), it was the state of the doctrine of unseaworthiness which impelled the *Moragne* decision.

There are no characteristic maritime concepts before this Court. Garris was not a seaman. He did not travel by vessel over the water. He lived, worked and died in Virginia. There is no claim against the vessel; there is no issue of seaworthiness; there is no need for a uniform general law to avoid tension or conflict between trading partners.

Plaintiff next would support its claim that *Moragne*'s scope was expansive with assumptions, asserting that pundits, litigants and courts[10] have assumed that *Moragne* created a general cause of action in negligence. Assumptions are meaningless. The Fourth Circuit, referencing *Gilmore & Black*, made the point below: "[t]his treatise offers no analysis to support its assertion that *Moragne* created a general maritime law cause of action for wrongful death based upon negligence." 210 F.3d 209, 216 n.5. An assumption by a court provides no greater authority. Courts decide issues as framed by the litigants before them.

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9. *Moragne*, 398 U.S. 375, 398-99; *Leathers v. Blessing*, 105 U.S. 626 (1882), and *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959), cited by plaintiff (Brf. pp. 3-4), involved negligence in the operation/navigation of the vessel. They thus involved the breach of "maritime duties."

10. *In Re Amtrak "Sunset Ltd." Train Crash*, 121 F.3d 1421 (11th Cir. 1997); *Thibodaux v. Atlantic Richfield Co*, 580 F.2d 841 (5th Cir. 1978); *Law v. Sea Drilling Corporation*, 523 F.2d 793 (5th Cir. 1975); *General Chemical Corporation v. De La Lastra*, 852 S.W.2d 916 (Tex. 1993).

Plaintiff also asserts that *Miles v. Melrose*, 882 F.2d 976, 985 (5th Cir. 1989), *aff'd sub nom. Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), and *Wahlstrom v. Kawasaki Heavy Industries, Ltd.*, 4 F.3d 1084, 1088-89 (2d Cir. 1993), decided that *Moragne* created a cause of action in negligence.

Miles did not so decide; *Miles* did not involve a general maritime law negligence claim. The subject was the death of a seaman. Plaintiff pursued claims of negligence under the Jones Act against the vessel owner and unseaworthiness under general maritime law against the vessel. Thus the case presented the very antithesis of the circumstances before this Court. The subjects in *Miles* were characteristically maritime in nature, *i.e.*, duties owed a seaman; vessel liability; unseaworthiness. The scope of *Moragne* was not litigated; the court simply made a gratuitous statement that *Moragne* created a wrongful death cause of action for negligence and unseaworthiness. (882 F.2d at 985). *Wahlstrom*, which assumed, incorrectly, — as *Yamaha* now makes clear — that *Moragne* precludes the use of state wrongful death statutes in maritime claims, simply asserted, again without the benefit of supportive analysis, that *Moragne* is not limited to unseaworthiness claims. (4 F.3d 1084, 1088-89).

Finally, it is highly significant that plaintiff does not respond to the analysis of the Fourth Circuit below, which ruled that *Moragne* did not create a general negligence cause of action. The Fourth Circuit explained that *Moragne* involved concepts peculiar to and characteristic of the sea — and which thus require uniform treatment: *i.e.*, an action against a vessel and a claim of unseaworthiness. Also, *Moragne* was impelled to create a new cause of action because of three "anomalies," all of which implicated unseaworthiness.[11] 210 F.3d 209, 215-16.

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11. *Yamaha v. Calhoun*, 516 U.S. 199, 213.

Plaintiff's only response is to assert (Plf's Brf. pp. 10, 11) that the first of the three anomalies might be construed to apply to negligence as well as unseaworthiness. *Moragne* described that anomaly as follows:

> Within territorial waters, identical conduct *violating federal law* (here the furnishing of an unseaworthy vessel) produces liability if the victim is merely injured but frequently not if he is killed. 398 U.S. 375, 395 (emphasis supplied).

If, *arguendo*, negligence were deemed to constitute conduct "violating federal law[12]", the court's statement nevertheless does not apply to negligence. *Moragne* was a gap filler; there is no gap on the subject of negligence. At the time *Moragne* was decided, all states provided wrongful death remedies for negligent conduct. Thus negligence was actionable whether the victim was killed or injured. Stated plainly, at the time *Moragne* was decided, the state of the law upon the subject of negligence did not require creation of a new cause of action — *and it does not require such today.*

Also, the *Moragne* court was, in fact, concerned with law which must be uniform because it is federal in nature or characteristic of the sea. Thus, *Miles v. Apex Marine Corp.*, specifically noted that the first anomaly *was directed to vessel liability*:

> The emergence of *unseaworthiness* as a widely used theory of liability made manifest certain anomalies in maritime law that had not previously caused great hardship. First, in territorial waters, general maritime law allowed a remedy *for unseaworthiness* resulting in injury but not death. 498 U.S. 19, 26 (emphasis supplied)

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12. Ordinary care is a creature of common law and not at all a characteristic maritime duty like seaworthiness.

In sum, *Moragne* concerned a subject that demanded uniform treatment for the sake of the country as an economic unit. The point was stated in *Yamaha v. Calhoun*: "[t]he uniformity concern that drove our decision in *Moragne* related . . . to the availability of unseaworthiness as a basis of liability." 516 U.S. 199, 211. If, *arguendo*, *Moragne* created a cause of action in negligence, *such would necessarily be limited to vessel negligence*: the subject in both *Harrisburg* and *Moragne* was vessel liability. However, *Moragne* said nothing to indicate it created such a negligence action *and, in fact, left in place the plaintiff's negligence claim under Florida law*. 516 U.S. at 214. Certainly *Moragne* had nothing to do with strictly local disputes. *Moragne* created no general maritime cause of action against land-based, local, independent contractors. *Moragne* specifically cautioned that the action it recognized was directed to removal of the tensions and discrepancies that result from using state wrongful death statutes for "exclusively maritime substantive concepts." 398 U.S. 375, 401.

There must be no mistake. The instant case is a strictly local dispute. The Fourth Circuit got it wrong. This is not a case where it is mere happenstance that Mr. Garris died in Virginia (the *Garris* court's concept, 210 F.3d at 221). Garris was not passing through; Garris lived, worked and died in Virginia. Also, defendant and E.T. Gresham and plaintiff's employer, Tidewater, are Virginia enterprises. The crane which wielded the boom was located on and operated from Virginia soil. The only happenstance is that decedent's employer hired him out to a contractor who placed him on a vessel and that he was on the vessel when struck by the boom.

D. The Proper Balancing Of Federal And Virginia Interests

Mizenko v. Electric Motor & Contracting Co. Inc., 419 S.E.2d 637 (Va. 1992), cited by plaintiff, does not support plaintiff's trivialization of Virginia's interests. *Mizenko*, which

held that the Virginia worker's compensation exclusivity provision (Va. Code Ann. § 65.2-307 (1950)) does not bar plaintiff's general maritime injury claim against a statutory employer, considered Virginia's interests as a relative concept only: "Mizenko has a substantive admiralty right . . . We view this as a compelling federal aspect in our review process." 419 S.E.2d at 642-43. The court found federal interests paramount, as state law would prejudice characteristic features of general maritime law.

Where, as here, uniformity does not compel creation of a new cause of action, plaintiff's remedy, if at all, is under Virginia law. Virginia interests are substantial upon the circumstances of the instant case which present only matters of local concern. In addition to Virginia's obvious interest in providing wrongful death remedies for the benefit of its citizens, Virginia public policy is embodied in its "statutory" or remote employer concept (Code § 65.2-302; 65.2-307(a)), which applies when employees consent to the arrangement.[13] (Code § 65.2-300(a)). The statutory goal is protection of employees of subcontractors who are not financially responsible. *Vess v. Davis Electrical Constructors, Inc.*, 613 F. Supp. 1047, 1049 (W.D. Va. 1985) (statutory employer section intended to prevent employers from escaping coverage of the Act by doing through independent contractors and subcontractors what they normally would have done through employees).[14] Also, there is a second and equally

13. By notice, an employee may exempt himself from the terms of the Act and retain his common law rights. *Dillard v. Industrial Comm. of Va.*, 347 F. Supp. 71, 73 (E.D. Va. 1972), *vacated on other grounds*, 416 U.S. 783 (1974).

14. The LHWCA's statutory employer provision (§ 904), like that of the Virginia statute, is designed to secure payment of compensation benefits due workers. *Davis v. United States Lines Co.*, 153 F. Supp. 912, 915 (E.D. Pa. 1957). The statutes differ only

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compelling objective: the exclusivity provision (Code § 65.2-307), based upon the *quid pro quo* of the worker's compensation scheme, *Whalen v. Dean Steel Erection Co.* Inc., 327 S.E.2d 102, 106 (Va. 1985), presents a measured basis, as does the LHWCA, to reasonably estimate job-related accidents and incorporate them in project costs. Worker's compensation insurance rates are based on the level of risk associated with the trade, business or occupation, (Code § 65.2-821), thereby spreading the insurance risk among industry members. *Evans v. Hook*, 387 S.E.2d 777, 780 (Va. 1990); *Counts v. Stone Container Corp.*, 387 S.E.2d 481, 484 (Va. 1990).

E. Plaintiff's Attempt To Negate Congressional Intent/ Separation Of Powers Concerns

Congress has repeatedly declined (in both DOHSA and the LHWCA) to create a federal cause of action against non-vessel third parties for the negligent death of a harbor worker in state territorial waters — thereby leaving plaintiffs such as Garris to their state law remedies. *See Miles v. Apex Marine Corp.*, 419 U.S. 19, 25 (1990) ("Congress did not extend DOHSA to territorial waters because it believed state statutes sufficient in those areas."); *Garvin v. Alumax of South Carolina, Inc.*, 787 F.2d 910, 917 (4th Cir. 1986) (LHWCA does not create a federal cause of action in favor of an employee against a third party, unless the third party is a vessel).[15] Plaintiff now asks this Court

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in the specifics of their application. Federal immunity applies only if the subcontractor has, in fact, failed to secure payment. *Garvin v. Alumax of S. Carolina, Inc.*, 787 F.2d 910, 916 (4th Cir. 1986).

15. Plaintiff's attempts to deny Congress' intent to preserve the applicability of state law to negligent wrongful death caused by non-vessel third parties in state territorial waters in DOHSA and the LHWCA are decidedly unavailing. *Moragne* addressed

(Cont'd)

to violate separation of powers principles by discounting Congressional intent and judicially creating a remedy Congress has had multiple opportunities to consider but never seen fit to enact — solely to avoid application of unfavorable Virginia law in this case.

This the Court should not do. *Northwest Airlines v. Transport Workers*, 451 U.S. 77, 96 (1981) ("Even in admiralty . . . it is our duty to respect the will of Congress"). The court's rejection of an analogous plea by ship repair workers seeking application of federal maritime law to avoid an Alabama statute of limitations bar to asbestos injury claims in *Harville v. Johns-Manville Products Corp.*, 731 F.2d 775 (11th Cir. 1984), underscores the point:

> . . . Absent congressional action, the federal interest in these claims is insufficient to justify federal courts supplanting state law with the federal common law of admiralty. *See Executive Jet*, 409 U.S. at 272-73, 93 S. Ct. at 506-507. . . . In the situation before us, which is only fortuitously and incidentally connected to navigable waters . . . the [state] courts could plainly exercise jurisdiction over the suit, and could plainly apply familiar concepts of [state] tort law without any effect on maritime endeavors.
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> * * *

(Cont'd)
unseaworthiness, not negligence, and was promptly superseded by the 1972 Amendments to the LHWCA. Plaintiff's other cited cases all address injuries rather than death and thus have no bearing on the instant inquiry. Plaintiff's reliance upon certain LHWCA legislative history providing for application of federal law (Plf's Br., p. 42) is likewise misplaced: the cited provision is directed solely to "the negligence remedy authorized in the bill", i.e. vessel liability under Section 905(b), and thus is of no import here.

> . . . By granting the federal courts jurisdiction over maritime disputes, the Constitution does not license them to repair injustice whenever they may perceive it. **The purpose of admiralty jurisdiction is not to permit the federal courts to recognize causes of action for claims . . . whenever state law precludes such claims.** Whether or not we agree, we are bound to respect Alabama's policy, expressed in its statute and constitution, of granting repose to potential tort defendants a year after commission of the wrong. We can discern no policy requiring this Court to apply to the plaintiffs a different set of substantive rules . . . merely because the plaintiffs worked on ships rather than on land.

731 F.2d at 786-87 (emphasis supplied).

CONCLUSION

For the reasons above stated and upon the authorities cited, defendant respectfully prays for the relief requested in its opening brief.

Respectfully submitted,

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